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WILLIAM A. MUNDELL
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AZ CORP COMMISSION
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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH SECTION 271 OF
THE COMMUNICATIONS ACT OF 1996

DOCKET NO. T-00000A-97-0238

NOTICE OF FILING

The Arizona Corporation Commission Staff ("Staff") hereby files its Supplemental Staff Report and Recommendation in the above-entitled matter.

RESPECTFULLY SUBMITTED this 4th day of October, 2002.

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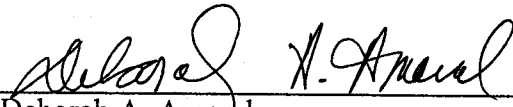
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BEFORE THE ARIZONA CORPORATION COMMISSION

**WILLIAM A. MUNDELL
CHAIRMAN**

**JIM IRVIN
COMMISSIONER**

**MARC SPITZER
COMMISSIONER**

**IN THE MATTER OF QWEST)
CORPORATION'S COMPLIANCE)
WITH SECTION 271 OF THE)
TELECOMMUNICATIONS)
ACT OF 1996)**

Docket No. T-00000A-97-238

SUPPLEMENTAL STAFF REPORT AND RECOMMENDATION

October 4, 2002

I. Introduction

The purpose of this Supplemental Report and Recommendation is to summarize the responses received to Staff's recent data requests in the 271 proceeding and present Staff's analysis and recommendation for further proceedings in this case. Another objective is to present Qwest Corporation's ("Qwest") and CLEC comments that were filed in response to Staff's Notice and Request for Additional Comment. The purpose is also to respond to the Commissioners' inquiries as to whether and to what extent the 271 record has been tainted as a result of the provisions in unfiled agreements which precluded certain parties from opposing Qwest's application.

II. Background

On March 8, 2002, AT&T Communications of the Mountain States, Inc. ("AT&T") and TCG Phoenix ("TCG") filed a Motion with the Commission to reopen the record in portions of the case to determine whether Qwest was actually 271 compliant given its actions in not filing certain agreements with the Commission under Section 252(e) of the 1996 Act. AT&T based its request on a complaint filed with the Minnesota Public Utilities Commission ("MPUC") stating that Qwest had not filed certain agreements with the MPUC which it was required to file under Section 252(e) of the 1996 Act for approval.

Staff filed a response alternatively recommending that the Commission commence a separate investigation into Qwest's compliance with Section 252(e) of the 1996 Act. The Hearing Division denied AT&T's Motion to Reopen the Section 271 record to consider the various agreements and by Procedural Order dated April 18, 2002, established a procedural schedule for review of the agreements in Docket RT-00000F-02-0271.

On June 7, 2002, the Arizona Corporation Commission ("ACC") Staff filed its Report and Recommendation on Qwest's compliance with Section 252(e) of the 1996 Act. A Procedural Conference was subsequently held on June 19, 2002 to address a variety of issues, including the impact of the unfilled agreements on the 271 proceeding. On June 26 and June 27, 2002, Commissioners Spitzer and Irvin respectively, put letters in this Docket inquiring as to the effect of any clauses restricting carriers from participating in the 271 proceeding on the record of this case, and requesting that this issue be investigated.

As a result of the Procedural Conference and the Commissioners' inquiries, Staff issued further discovery in this docket. Staff asked, inter alia, whether any carrier believed it had been precluded from participating in this proceeding as a result of any agreement with Qwest and if so whether it had any unresolved issues. With respect to the operations support system ("OSS") test in Arizona, Staff also sent data requests to its Test Administrator, CAP Gemini Ernst & Young ("CGE&Y") and Test Transaction Generator, Hewlett Packard ("HP"), for their input on this issue, and to determine if in their opinion the results of the test were affected by lack of participation of some CLECs.

Staff also requested comment by interested parties on whether they believed that the record had been tainted as a result of the agreements.

The purpose of this Report and Recommendation is to summarize the responses received to Staff's data requests, present Staff's analysis and conclusions and finally, its recommendations for further proceedings in this Docket.

III. Executive Summary

According to the responses to Staff's data requests, four parties XO Communications, Inc. ("XO"), Eschelon Telecom, Inc. ("Eschelon"), Z-Tel Communications, Inc. ("Z-Tel") and McLeodUSA, Inc. ("McLeod") had agreements with Qwest which could have limited their participation in the Commission's 271 proceeding. Two of these carriers, Eschelon and McLeod, stated that they had unresolved issues as a result of their agreements with Qwest. AT&T commented that it believed that nonparticipation of certain parties in the 271 proceeding had an adverse effect on the record and may have produced more favorable results than otherwise would have been the case. WorldCom, Inc. ("WorldCom") and Covad Communications Company ("Covad") also raised concerns about the nonparticipation of certain parties and the resulting impact on the 271 record. In their responses to Staff's data requests, CGE&Y and HP stated that they believed the unfiled agreements had no impact on the OSS test and its results.

As a result of the letters, comments and data responses that were filed in this proceeding, Staff believes that an initial showing has been made by one or more CLECs that Qwest interfered with the 271 regulatory process at the Commission and that the 271 record was incomplete as a result. In order to address the record problems, Staff held a workshop on July 30-31, 2002, to address the concerns of parties, including Eschelon and McLeod, which believed that they had been precluded from raising issues due to an agreement with Qwest. Other parties were allowed to participate to the extent they had issues which arose from the new evidence presented. Staff is in the process of resolving the issues raised and has asked CGE&Y to do some additional data reconciliation work due to concerns raised by Eschelon. Staff will be issuing a separate report on the July 30-31, 2002 workshop. Staff believes that this workshop has allowed all parties (including Eschelon and McLeod) to have their concerns made part of the record. Because of this workshop, there is no reason to believe at this time that the record is still incomplete.

To address allegations that Qwest interfered with the 271 regulatory process, and the extent to which additional fines should be assessed against Qwest for its conduct, a sub-docket to the 271 docket should be opened. The sub-docket should conclude before the Commission makes its final recommendation to the FCC on Qwest's 271 application.

Two issues arise from the 252(e) proceeding that impact this 271 proceeding. First, pursuant to Section 251 of the Act and Checklist Item 2, Qwest must provide nondiscriminatory access to unbundled network elements. Identification of the contracts that should be filed in accordance with Section 252(e), their filing by Qwest for

Commission approval, and Qwest's commitment to abide by Staff's interpretation of what constitutes an "interconnection agreement" subject to any future ruling by the FCC, are critical steps in addressing Checklist Item 2 issues on a prospective basis. Qwest recently filed 14 agreements and has agreed to file any other agreements identified by the Commission in the 252(e) proceeding as subject to the filing requirement.

The other 271 issue that arises concerns Qwest's past conduct and the weight that should be given in the public interest phase of this case. Staff anticipates that the Commission will adopt remedies commensurate with the level of violation found in the 252(e) enforcement proceeding and that the remedies the Commission adopts in that case will serve the public interest. This should address any public interest concerns raised, except to the extent parties also believe that the Commission should find Qwest's 271 application is not in the public interest due to the alleged 252(e) violations. Staff believes that parties should be given an opportunity to submit additional comment on the weight the Commission should give the 252(e) issue when making its final recommendation to the FCC on whether Qwest's application is in the public interest. Since the record has not closed in the public interest phase of this case, parties could file their comment on the 252(e) issue now; and on whether, given the nature of the allegations, the Commission should find that Qwest's Section 271 application is not in the public interest.

With (1) Checklist Item 2 issues resolved on a prospective basis, (2) past violations being addressed in the 252(e) enforcement docket, (3) the parties given an opportunity to comment on the weight to be given 252(e) in the public interest phase and (4) the other 271 related issues being addressed in a subdocket to the 271 proceeding, it is the position of Staff that both dockets can proceed independently. Thus, it is not necessary, in Staff's opinion, for the 271 proceeding to be held in abeyance pending the outcome of the Section 252(e) enforcement proceeding.

IV. Summary of Data Responses and Comments

A. Data Responses

The data requests sent to the CLECs by Staff in this docket are contained in Exhibit A to this report. As can be seen by Exhibit B, Staff sent data requests to the approximately 80 carriers that are certificated as CLECs in Arizona, as well as to the parties to this docket and the 252(e) proceeding. Responses and follow up telephone calls show that 20 carriers to whom data requests were sent have gone out of business, merged or have been acquired by other data request addressees, leaving a balance of 60 operating companies which could respond. To date, Staff has received responses from 44 CLECs, a 73% response rate. Staff has attempted to contact the remaining carriers who did not respond. No carrier contacted has indicated that it did not respond because of any agreement written or oral, with Qwest.

In question no. 4 of Staff's Second Set of Data Requests, Staff asked whether the carrier had entered into any agreements with Qwest, either written or oral, which had precluded the carrier from participating in this proceeding. If the answer was "yes", the

carrier was asked whether there were any issues that it had been precluded from raising that had not yet been resolved through the participation of other parties.

Of the CLECs that responded, three (Z-Tel, Eschelon and McLeod) stated that they had entered into agreements that limited their participation in the Qwest Section 271 proceeding.¹ See Exhibit C. While one of the three carriers, McLeod, did not actually answer "yes" to question 4 of Staff's Second Set of Data Requests, the Staff interpreted their answer as "yes". McLeod responded that: "Although it was not clear to McLeodUSA that the following 'limited' its ability to participate in any particular proceeding, McLeodUSA states that it has orally agreed to remain neutral on (neither support nor oppose) Qwest's 271 applications as long as Qwest is in compliance with all our agreements and with all applicable statutes and regulations. McLeodUSA does not have any agreement to stay out of all Qwest-related proceedings."

Z-Tel advised that they had agreed to not participate in 271 proceedings for a period of 60 days while they were negotiating Interconnection Agreements with Qwest in 8 states.

The only CLEC that answered with an unqualified "yes" was Eschelon. Eschelon's data request response to the follow up questions to question 4 of Staff's Second Set of Data Requests provided substantial comment on the fact that they had a signed unfiled contract in which they had agreed not to oppose Qwest in their 271 proceedings at the State commissions.

A total of four CLECs (Eschelon, Covad, AT&T and WorldCom) responded that they were aware of 271 issues that they believed were not adequately addressed in the Arizona proceedings as a result of Qwest's unfiled agreements with CLECs. WorldCom answered generically without naming any particular CLEC or circumstances but that an investigation was needed to determine if there were any issues not addressed. AT&T and Covad answered "yes" to question 4 of Staff's Second Set of Data Requests and advised that they answered "yes" because they believed Eschelon had issues that were not adequately addressed. Eschelon responded that its issues were not all resolved satisfactorily; they also indicated that since they could not participate, they did not know whether all issues had been addressed.

In summary, four carriers had agreements with Qwest which contained provisions in which the CLEC agreed not to oppose Qwest's 271 application before the state commission. Eschelon was the only carrier subject to such an agreement which, in their responses to Staff's Data Requests, alleged any ongoing unresolved issues in the 271 proceeding as a result of the agreement.²

¹ While only three indicated in their responses to Staff data requests that they had entered into agreements with Qwest that limited their participation to some extent in the 271 case, Staff also found an agreement between Qwest and XO with similar provisions.

² At the workshop, McLeodUSA also stated that there were issues it would have raised but for the agreement with Qwest.

B. Parties' Comments

In response to Staff's request for comments on the effect of unfiled agreements on the Section 271 process, comments were submitted by AT&T and TCG (collectively "AT&T"), WorldCom, Time Warner Telecom of Arizona LLC ("TWTA"), Eschelon, the Residential Utility Consumer Office ("RUCO"), and Qwest.

WorldCom stated that it could not make any allegations as to whether the unfiled agreements in any way affected the integrity of the 271 record. WorldCom stated that it had no independent knowledge or facts to state one way or the other whether the unfiled agreements in any way affected the integrity of the 271 record. WorldCom stated that, while it had not yet reviewed the agreements, its request for an investigation was intended to develop a factual record to determine whether the unfiled agreements in any way affected the integrity of the 271 record.

AT&T stated that Qwest's actions had the following impacts: 1) the Commission was led to believe that only AT&T and the long distance carriers had objections to Qwest's 271 application, and the long distance carriers' motive was simply to keep Qwest out of the long distance market; 2) Qwest's suggestion that small CLECs doing business had no complaints, as evidenced by their lack of participation in the section 271 proceeding, was inaccurate; and, by keeping the agreements secret, no evidence was available to contradict Qwest's assertions; 3) by not filing the agreements, the nature and extent of the problems being encountered by CLECs were kept out of the record and public eye; 4) the record was not fully developed, as evidenced by Eschelon's decision to pull out of the UNE-P workshops, leaving earlier problems raised by Eschelon unresolved; 5) favorable treatment provided to certain CLECs may have affected individual CLEC performance for the better, resulting in an inaccurate picture of actual CLEC performance data and affecting overall conclusions in the OSS test because of the reliance on commercial data by the Test Administrator to make findings of parity; and 6) the data reconciliation audit conducted by the Liberty Consulting Group may have been less extensive because of the lack of full CLEC participation.

AT&T stated that it does not suggest that CLECs should be prohibited from settling problems with Qwest. AT&T Comments at p. 3. What AT&T is suggesting is that by entering into agreements that should have been filed for approval and were not, the Commission was left in the dark about the extent of the problems. Id.

AT&T also stated that the preferential treatment raises questions regarding the reliability of the performance data results for the individual CLECs and the effect on the aggregate CLEC results. AT&T Comments at p. 6. Would the results have been worse had Qwest not been focusing its resources on specific CLECs to comply with the terms of specific CLEC agreements? AT&T stated that this is of concern because the Test Administrator relied on the commercial CLEC data in 52 instances to make findings of parity and relied on the Pseudo-CLEC data only 37 times. AT&T Comments at p. 6.

In its June 26, 2002, letter to Commissioner Spitzer, AT&T further stated that it believed the integrity of the Section 271 process to be tainted. AT&T believed that the process should be expanded to take evidence from CLECs that agreed either in writing or orally not to participate in the Section 271 proceedings and to take evidence from those carriers that entered into unfiled agreements with Qwest. AT&T also suggested that the Commission should reopen the record on the adequacy of the Change Management Process ("CMP"), Qwest's provision of switched access billing records and whether Qwest has violated the nondiscrimination provisions of the Act. AT&T further stated that the Commission must take additional evidence on whether Qwest's entry into the long distance market is in the public interest.

Time Warner filed comments stating that it was concerned with some of the agreements in that they appear to create pricing or service preferences for all or some of the interconnection obligations Qwest has pursuant to Section 251 of the Act. Time Warner further stated that while it understood and appreciated the need to resolve some billing or operational disputes on a confidential basis, it believed that Qwest clearly crossed the line when it appeared to have settled some disputes by giving certain competitors an undisclosed wholesale pricing or service advantage. Time Warner Comments at p. 2. According to Time Warner, Qwest appears to have behaved in a discriminatory fashion and that behavior should be seriously considered by the Commission in evaluating the public interest portion of Qwest's Section 271 application. Id.

In its June 24, 2002, letter to Commissioner Spitzer, Eschelon stated that Qwest required it to drop out of the 271 proceedings before its issues would be resolved. Letter at p. 2.³ Eschelon stated that its problems were not all resolved. Letter at p. 3. Eschelon further stated that a November 15, 2000, agreement with Qwest required Eschelon's silence. Id. Eschelon further stated that despite its arguments to the contrary, Qwest interpreted the agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the 271/SGAT proceedings. Id. Eschelon also stated that because Qwest required confidentiality and did not disclose the Escalation Letter, Qwest was able to create the impression that problems with Qwest's commercial performance

³ See also, February 8, 2002, Letter from Richard A. Smith of Eschelon to Joseph P. Nacchio of Qwest. ("Before Qwest would resolve previous legitimate business disputes that were pending late in 2000, Qwest required Eschelon to agree not to oppose Qwest in 271 proceedings. ...Qwest has gone so far as to try to make resolution of legitimate business issues contingent upon our destruction or surrender of an auditor's documents as well as to require us to submit testimony, regardless of its validity, in legal proceedings if "suitable" to Qwest.") p. 2. See also pps. 4-6. See also July 10, 2002, Letter from Eschelon to Commissioners Irvin and Spitzer. (Qwest representatives "generally took the position that the Escalation Letter barring Eschelon from participating in 271 proceedings also entailed that Eschelon should either be silent or support Qwest's position on other issues in the CMP monthly and Re-design processes. Qwest said that Eschelon had an obligation to deal directly with Qwest executives instead of raising issues in the CMP arena. Eschelon did not believe, however, that Qwest could separately address the types of issues Eschelon raised in those proceedings without affecting other CLECs and that consequently a bilateral approach would be futile.") p. 6. ("There is a correlation between the timing of Eschelon's assertion of its various rights and Qwest's stopping of the payments.") July 10, 2002, Letter at p. 10. See also July 10, 2002 Letter, at p. 15. (At the multi-state SGAT workshop held in Denver April 30-May 2, 2001, Qwest representatives "told Ms. Clauson in no uncertain terms that she should not be present.").

were solved when all of them were not. Letter at p. 4. Eschelon stated that it had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona 271 proceeding. Eschelon further stated that Qwest was aware of these problems, through many discussions with Eschelon, as well as through monthly Report Cards provided by Eschelon to Qwest during that time. Eschelon could not raise these issues to the ACC, however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in 271 proceedings.⁴ Id. Eschelon stated that although it was dissatisfied in several respects, pursuant to the November 15, 2000, Escalation Letter, Eschelon was not "free to say so, to the ACC or to anyone else." Letter at pps. 4-5. Eschelon also stated that it would have participated more fully in CMP, if Qwest had not exerted pressure on Eschelon not to do so. Id. Eschelon further stated that Qwest had Eschelon representatives pulled from CMP Re-Design meetings; reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report; required Eschelon to withdraw a Change Request relating to anti-competitive conduct before it was distributed to other CLECs; and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Eschelon Letter at p. 5.

Eschelon also stated that at one point, Qwest provided two written proposals to Eschelon. In one, Qwest said it would require Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process" relating to missing switched access minutes to Qwest. In the second, Qwest conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest to file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." Eschelon stated that it refused to sign either of these proposals. Id.

RUCO also submitted Comments in response to Staff's Notice. RUCO stated that to date the Commission has not received full disclosure of the facts. RUCO Letter at p. 2. RUCO also states that full disclosure gives the Commission and every interested party an opportunity to make a judgment about whether the agreements have infected the Commission's record. Without full disclosure the process remains compromised. For that reason, RUCO believes the side agreements have tainted and will continue to taint the integrity of the 271 proceeding. Id.

RUCO stated that it, the Commission and the public are entitled to know if Qwest paid competitors for not attending 271 proceedings particularly since competitors are in the best position to say whether Qwest gives open access to local telephone markets. Id. Absent disclosure of the secret agreements, the Commission, RUCO, and the public would be left with the impression that at least some competitors tacitly approved of how Qwest was providing them with local telecommunications access. Id. RUCO also stated

⁴ See also July 10, 2002, Letter from Eschelon to Commissioners Irvin and Spitzer. ("Despite Qwest's sweeping claims to the contrary, Eschelon could not, consistent with its obligations, file complaints before any regulatory body regarding quality of service, pricing, discrimination, or any other issue arising under the interconnection agreement during negotiations or afterward.") p. 12.

that the Arizona Supreme Court in the strongest terms has disapproved of settlement agreements that are not disclosed in the course of adversarial proceedings. Id.

Qwest stated that only two agreements contained provisions concerning the CLEC's participation in Section 271 proceedings: (1) the December 31, 2001, Confidential Billing Settlement Agreement with XO Communications, Inc., and its subsidiaries; and (2) the November 15, 2000, Confidential Billing Agreement with Eschelon.

With regard to the XO agreement, Qwest stated that it and XO had billing disputes as well as disputes about reciprocal compensation and the methods for measuring paging, ISP-bound traffic, and non-ISP-bound traffic. Qwest Comments at p. 4. The agreements resolved those disputes. Id. Qwest further stated that recognizing the obligation to make certain of the resolutions available to all similarly situated carriers the agreement provided that amendments to the Qwest-XO interconnection agreements in Arizona and five other states would be filed within 15 business days of the execution of the agreement. Qwest Comments at pps. 4-5. The amendments were filed as an amendment to the parties' interconnection agreement on April 3, 2002, and they therefore became available to other CLECs on July 2, 2002. Qwest Comments at p. 5. Qwest stated that as part of the resolution of those issues, XO agreed to stipulate to the appropriate state and federal regulatory agencies that Qwest complies with the 271 checklist in Arizona, Colorado, Oregon, Minnesota, Utah, and Washington. Id.

Qwest went on to state that the XO agreement explicitly resolved all of XO's issues concerning Qwest's compliance with Section 271. Id. Qwest stated that the agreement actually promoted the interests of Section 271 by creating a region-wide resolution of a set of controversial issues affecting CLECs. Id. Qwest argued that XO's non-participation in the 271 proceedings did not lead to the failure of any Section 271 issues to be considered in this Docket. Id. The purpose of the agreement with XO, according to Qwest, was to structure a Qwest-XO business-to-business relationship and to gain greater certainty about certain financial issues affecting XO, in anticipation of a possible bankruptcy filing by XO. Qwest Comments at pps. 5-6. Qwest also argued that XO's decision to not participate in the 271 proceeding pre-dates the agreement. Qwest Comments at p. 6. Qwest stated that XO had not participated in any 271 proceedings since 1999. Id.

As for the Eschelon agreement, Qwest stated that it is inappropriate to suggest that Qwest at any time forced Eschelon to remain silent on 271-related issues. Qwest Comments at p. 6. Qwest stated that Eschelon decided, of its own free will, to work with Qwest to resolve the business issues between them. Id. Qwest stated that Eschelon could have decided at any point in the negotiation process that it did not wish to enter into an agreement with Qwest and instead wished to pursue its claims through regulatory processes including 271. Id. Qwest further stated that even after the agreement was signed, if Eschelon believed that Qwest was not living up to its commitments in the agreement, Eschelon could have sought redress through regulatory or legal avenues. Qwest Comments at p. 7. Qwest stated that any suggestion by Eschelon that Qwest

could, or did, prevent Eschelon from participating in the 271 process is simply baseless. Id. Further, Qwest stated that the agreement served the interests of Section 271, because its purpose was to develop an implementation plan that would address issues raised by Eschelon in negotiations and improve the provisioning process for all CLECs. Id.

Qwest argued that no party has an obligation to expend the time and resources necessary to participate in a lengthy, regulatory proceeding such as the 271 proceeding. Qwest Comments at pps. 8-9. Qwest stated that it is reasonable for a party to conclude that it can advance its interests more effectively by building a less confrontational relationship with a business partner. Qwest Comments at p. 9. According to Qwest, settlements outside of the regulatory process are both legal and desirable. Id. Qwest also stated that its business-to-business negotiations with specific CLECs led to resolution of issues that benefited all CLECs. Qwest Comments at p. 10. As Qwest implements a wholesale service process to address an issue for one CLEC, such as Eschelon or XO, that process is implemented uniformly and all CLECs benefit from the improved process. Id.

In its June 18, 2002 Letter to Commissioner Spitzer, Qwest reiterated that the purpose of its negotiations with CLECs was to resolve the issues that the CLEC might otherwise have raised in the Section 271 proceeding. Qwest noted that, on November 3, 2000, Eschelon informed the Commission and all parties in the Section 271 docket that it was working with Qwest to resolve its provisioning issues. Qwest cited the following passage from Eschelon's letter: "Eschelon will continue to have discussions with Qwest to try to resolve these issues, but will participate in the workshop currently scheduled for November 29 through December 1 if sufficient progress is not made before that time." Qwest June 18, 2002 Letter at p. 2. Qwest also stated that Eschelon did, in fact, actively participate in the Section 271 CMP. Qwest stated that of the forty-four CMP redesign core team meetings, Eschelon participated in thirty-nine. Qwest also stated that of the 192 systems change requests from CLECs, Eschelon submitted sixty-six. Qwest also stated that Eschelon submitted fifty-four, or fifty percent, of the 108 product-process change requests. Qwest June 18, 2002 Letter at p. 2.

V. OSS Test Administrator and Test Transaction Generator (Pseudo-CLEC) Responses to Staff Data Requests

In its First Set of Data Requests to CGE&Y, the Test Administrator, and HP, the Test Transaction Generator, Staff asked the consultants to indicate, for each of the five tests performed, whether the test activities were: 1) not dependent upon CLEC input; 2) partially dependent upon CLEC input; or 3) heavily dependent upon CLEC input. See Exhibit D attached.⁵

CGE&Y and HP both submitted their responses to Staff's First Set of Data Requests on July 10, 2002. CGE&Y responded that the execution of the Capacity Test was not dependent on CLEC input. CGE&Y stated that it used the Pseudo-CLEC for the execution of the Capacity Test. CGE&Y also stated that the Functionality Test relied on

⁵ Exhibit D contains Staff's First Set of Data Requests to CGE&Y and HP and their responses.

data and observations of the Pseudo-CLEC except in the evaluation of performance metrics where commercial CLEC results were also considered where sufficient commercial volume existed. In addition, four CLECs (AT&T, Covad, WorldCom and Cox), provided data for or assisted with execution of certain tests where commercial CLEC facilities were required. CGE&Y stated that although CLECs participated in these limited test execution activities, all conclusions from the Functionality Test were drawn from test data and/or aggregate CLEC results once the accuracy of such results were validated through the Performance Measurement Audit ("PMA"), data reconciliation and comparison of Functionality Test results. With respect to the Relationship Management Evaluation, CGE&Y stated that the results were partially dependent upon CLEC input, but because CLEC input was repeatedly solicited, but only a limited response obtained, the majority of input came from the Pseudo-CLEC supplemented by extensive research by CGE&Y. As to the Retail Parity Evaluation, CGE&Y stated that the results were not dependent upon CLEC input. WorldCom provided access to EB-TA/IMA-EDI for CGE&Y to perform limited test scripts. Finally, as to the PMA, no PMA test activities were dependent upon CLEC input. CLEC data used to conduct the PMA were provided by Qwest.

CGE&Y also stated in response to Staff's First Set of Data Requests that its findings in the Final Report are fully supported by the data and information it received and relied upon during the OSS test, as detailed and more fully described in its Final Report. CGE&Y stated that it was not, and is not now, aware of any information or data that "improperly influenced" the OSS test. CGE&Y also stated that it was not aware of any instance in which the outcomes of any of the OSS tests performed were improperly influenced by a CLEC's nonparticipation. HP stated that no CLEC-provided information or data relied on in the test results improperly influenced the outcome of any test that HP performed. Further, having reviewed the data request responses of AT&T, Eschelon, WorldCom and Covad, both CGE&Y and HP stated that none of the concerns raised lead either to conclude that the test results were compromised or that the testing performed was inadequate.

On July 24, 2002, AT&T filed Comments stating that it found CGE&Y answers to be nonresponsive, incomplete and misleading. AT&T further stated that it believed CGE&Y inappropriately limited its responses in certain cases. Staff, therefore, sent a Second Set of Data Requests to CGE&Y to address AT&T's concerns. CGE&Y submitted its responses to the Staff's Second Set of Data Requests on August 15, 2002. See Exhibit E attached.⁶ Pages 2 and 3 of CGE&Y's responses contained a detailed explanation of the CLEC involvement in each stage of the five tests. CGE&Y confirmed that its findings in the Final Report are fully supported by the data and information it received and relied upon during the OSS test. CGE&Y also stated that it was not, and is not now, aware of any information or data that "improperly influenced" the OSS test. CGE&Y also reiterated that it was not aware of any instance in which the outcomes of any of the OSS tests performed were improperly influenced by a CLEC's nonparticipation.

⁶ Exhibit E contains Staff's Second Set of Data Requests to CGE&Y and their responses.

VI. Staff Discussion and Recommendations

A. Interference with the 271 Regulatory Process

As discussed above, the responses to Staff's data requests and a review of the contracts indicate that four agreements contained provisions wherein CLECs agreed not to oppose Qwest's 271 application as part of the agreement. The four agreements included those between Qwest and the following CLECs: Z-Tel, XO, McLeod and Eschelon.

The May 18, 2001, Memorandum of Understanding between Z-Tel and Qwest contained a Litigation Stand-Down provision for a period of 60 days while the parties were negotiating the provisions of a new interconnection agreement.⁷ In its responses to Staff's data requests, Z-Tel indicated that the stand-down period covered the time period May 18, 2001, to July 17, 2001. Up to the beginning of the stand-down period, Z-Tel had participated in the Arizona Performance Assurance Plan ("PAP") proceeding. While Z-Tel acknowledged this limitation on its ability to participate in Arizona during this time period, in response to another Staff data request, Z-Tel indicated that there were no issues it would have raised had its ability to participate not been limited. Z-Tel also indicated that it was not aware of any 271 issue that had not been adequately addressed in the Arizona 271 proceeding as a result of the unfiled agreements with Qwest.

The agreement between XO and Qwest was executed on December 31, 2001. As part of the agreement, XO agreed to stipulate that Qwest and XO had resolved all of XO's outstanding 271 Checklist issues to the satisfaction of both parties. XO also stipulated that Qwest complied with the 271 Checklist in certain states, including Arizona. In its responses to Staff's data requests, XO indicated that while it had intervened in the Arizona 271 proceedings it did not actively participate. See Exhibit G. XO stated that its affiliates actively participated in 271 proceedings only in those states in which they had sufficient experience with Qwest and in which they sought to raise and seek resolution of state specific issues based on that experience. XO stated that it had only begun providing service in Arizona when the 271 proceedings began and thus chose not to participate actively in those proceedings. XO also responded that there was no agreement, either oral or written, which limited its ability to participate in the Commission's 271 proceeding.

McLeod stated that it petitioned to intervene in the Arizona 271 proceeding on April 22, 1998. On February 26, 1999, McLeod stated that it petitioned to withdraw from the Arizona 271 docket, which petition was granted on March 18, 1999. McLeod stated that to the best of its recollection, its withdrawal was due to a desire to avoid resource commitment associated with responses to discovery requests, in light of very limited business at the time. However, McLeod stated that in October, 2000, it orally agreed to remain neutral (neither support nor oppose) Qwest's 271 applications as long as Qwest was in compliance with all of its agreements and with all applicable statutes and regulations. In its responses to Staff data requests, McLeod stated that it did not know

⁷ See Exhibit F which contains copies of the relevant provisions of the agreements.

what, if any, issues would have been raised in the absence of the oral agreement. However, at the workshop held on July 30-31, 2002, McLeod raised several issues and stated that but for the oral agreement, it would have raised these issues earlier in the 271 proceeding.

The agreement between Qwest and Eschelon was executed on November 15, 2000, and provided in relevant part as follows:

During the development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001, Eschelon agrees to not oppose Qwest's efforts regarding Section 271 approval or to file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements.

In addition to the agreements themselves, Staff relies upon the following comments in finding that an initial showing has been made that Qwest interfered with the Commission's 271 regulatory process. In its various letters, Eschelon stated that it could not oppose Qwest in the ACC 271 proceeding because of this agreement. See Exhibit G. Eschelon further stated that Eschelon's arguments to the contrary notwithstanding, Qwest interpreted the agreement more broadly than not opposing Qwest, and said that Qwest required Eschelon not to participate in the 271/SGAT proceedings. Eschelon stated that the relevant time period of nonparticipation was November 15, 2000, through February 28, 2002. As a result of its inability to participate, Eschelon stated that its issues were not all resolved satisfactorily.

In its June 24, 2002, Letter to Commissioner Marc Spitzer, Eschelon stated the following:

Because Qwest required confidentiality and did not disclose the Escalation Letter, Qwest was able to create the impression that problems with Qwest's commercial performance were solved when all of them were not.

Eschelon further stated that it had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona 271 proceeding. Qwest was aware of these problems, through many discussions with Eschelon, as well as through monthly Report Cards provided by Eschelon to Qwest during that time. Eschelon stated that it could not raise these issues to the ACC, however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in 271 proceedings.

As already discussed, Eschelon stated that it would have participated more fully in the CMP, if Qwest had not exerted pressure on Eschelon not to do so. See June 24, 2002, Letter at p. 5. Eschelon stated that Qwest had its representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other

CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Id.

Eschelon also made reference to Qwest objecting to Eschelon raising publicly any problems with commercial performance. Eschelon argued that it could participate in SGAT proceedings to gain input into the wording of the SGAT without submitting evidence of problems with commercial performance. According to Eschelon, Qwest took the position that Eschelon's participation in 271 SGAT related proceedings would breach the Escalation Letter. On one occasion when Eschelon's representative later attended a multi-state 271/SGAT workshop in Denver, Qwest objected and said she should not be there.

Eschelon also provided evidence of two proposals made by Qwest. One conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." In the second proposal, Qwest would have required Eschelon to "deliver to Qwest all reports, workpapers, or other documents related to the audit process" relating to missing switched access minutes to Qwest.

Eschelon also stated that Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. Eschelon stated that when doing so, Qwest was well aware of market conditions and the resulting additional pressure that would be placed on Eschelon from stopping the payments and knew that doing so gave Qwest greater leverage over Eschelon. July 24, 2002, Letter at p. 5.

In a separate letter to Commissioners Spitzer and Irvin dated July 10, 2002, Eschelon reiterated many of these same complaints along with others indicating that Qwest actively took steps to preclude Eschelon's participation in the 271 proceeding in Arizona when Eschelon wanted to and at times tried to participate. See Exhibit G.

Several other parties also alleged that the process was harmed by the inability of some carriers to participate. Covad stated that the fact that other parties were not able to participate made it more difficult for those parties that remained in the proceeding because (1) not all issues would be raised and, potentially resolved; and (2) the ability to share responsibility for issues would be eliminated. See Response of Covad to Staff Data Requests. WorldCom indicated that the Commission needed to get answers to the following questions: (1) Whether Qwest engaged in a pattern of conduct to silence competitors actively in business in Arizona and Qwest territory by entering into unfiled agreements; and (2) Whether Qwest attempted to limit Eschelon's, McLeod's, XO's or any other CLEC's participation in CMP redesign because of unfiled agreements with Qwest.

AT&T stated that Qwest was able to suggest that small CLECs doing business had no complaints, as evidenced by their lack of participation in the Section 271 proceeding. Further, AT&T stated that by not filing the agreements, the nature and

extent of the problems being encountered by CLECs were kept out of the record and public eye. AT&T also suggested that favorable treatment provided to certain CLECs may have affected individual CLEC performance for the better, resulting in an inaccurate picture of actual CLEC performance data and affecting overall conclusions in the OSS test. AT&T also suggested that the data reconciliation audit conducted by the Liberty Consulting Group may have been less extensive because of the lack of full CLEC participation.

In Staff's opinion, Qwest did not respond to the CLEC allegations satisfactorily. Qwest claimed, in its June 27, 2002, Comments, that the agreements did not adversely affect the integrity of the 271 proceeding. Qwest Comments at pps. 4-8. For instance, Qwest claimed that the Eschelon agreement served the interests of Section 271, because its purpose was to develop an implementation plan that would address issues raised by Eschelon in negotiations and improve the provisioning process for all CLECs. Qwest also stated that it would be virtually impossible for a party to demonstrate that the agreement with Eschelon prevented this Commission from considering any issues relevant to Section 271 compliance, given the formidable capabilities of the intervenors and the comprehensive and exhaustive record built and analyzed by the Commission over the last three-plus years. Qwest Comments at p. 8.

Qwest also argued that settlements outside of the regulatory process are both legal and desirable. Qwest stated that there is a strong public policy in favor of encouraging the private settlement of disputes instead of litigating them in formal proceedings. Qwest Comments at p. 9.

While Staff agreed with Qwest that settlements outside of the regulatory process are both legal and desirable, as discussed in Staff's initial Report, the policy favoring settlements must be balanced against the requirements of the 1996 Act which obligate Qwest and other ILECs to provide unbundled network elements, resale services and interconnection, or any wholesale service under Section 251, on a nondiscriminatory basis. Where the settlement agreement affects the terms, conditions or rates for the provision of resale services, interconnection and unbundled network elements, or any wholesale service subject to Section 251, it must be filed so that other similarly situated carriers may obtain the services on the same basis.

After considering all of the comments, letters and data responses, Staff believes that there has been an initial showing by one or more CLECs that Qwest did interfere with the 271 regulatory process, by precluding carriers from participating in the process, which otherwise would have participated and brought concerns regarding Qwest's provision of service to them before the Commission. Many of Eschelon's specific allegations were not directly or adequately addressed in Qwest's comments and letters. The completeness of the Commission's 271 record was adversely affected as a result. Additional concerns with Qwest's wholesale service provisioning would have been reflected in the record but for the nonparticipation of two CLECs. This type of information is critical in any investigation, but in particular the 271 investigation, where the Commission is required to perform a consultative role with the FCC on whether

Qwest meets the requirements of Section 271 of the 1996 Act and the Competitive Checklist. Staff also believes that the comments reflect, that at least with respect to two carriers, Qwest's conduct was designed to prevent their issues from being raised which would have reflected adversely on its compliance with Section 271 requirements.

The Commission's rules of process allow all interested parties to intervene and participate in proceedings before the Commission. R14-3-104 provides that: [a]t a hearing, a party shall be entitled to enter an appearance, to introduce evidence, examine and cross-examine witnesses, make arguments, and generally participate in the conduct of the proceeding. Qwest's conduct in the 271 proceeding prevented at least two parties from introducing evidence in the proceeding, making arguments in support of their position, from examining and cross-examining witnesses, and from generally participating in the conduct of the proceeding.

The FCC's 271 rules of process rely upon the State commission's development of a comprehensive factual record where all interested and affected parties have been able to introduce evidence as to relevant issues. The Commission's 271 procedures were specifically designed to create a very open, collaborative process resulting in the development of a comprehensive record that the FCC could rely upon. See, e.g. December 8, 1999, Procedural Order which, inter alia, sets forth separate processes for the review of disputed Checklist Items versus undisputed Checklist Items. Qwest interfered with these processes by requiring Eschelon and McLeod to remain silent on issues they would have otherwise brought to the Commission for consideration in whether Qwest had met all of the Checklist requirements. As already indicated, Eschelon and McLeod both have significant experience processing wholesale orders with Qwest. Thus, their participation in the 271 proceeding was important to the development of a complete record.

Staff has proposed that a sub-docket to the 271 docket be opened and that Qwest be subject to increased fines and non-monetary penalties for acting in contempt of the Commission's rules of process and 271 procedural orders and thereby adversely affecting the integrity of the Commission's 271 process. All of the letters, comments and data responses identified above should automatically become part of the record. Parties should be given 10 days to submit additional evidence and comment on the impact of certain parties' inability to participate. Qwest should have 10 days to respond, whereupon Staff will make a recommendation as to the amount of additional fines it proposes. Staff does not believe that a hearing is necessary. However, Qwest the entity which will be subject to fines, is entitled by law to request a hearing on the penalties imposed.

In summary, Staff believes that, based upon the parties' letters, comments and responses to Staff Data Requests, that Qwest did engage in conduct to preclude at least two Arizona competitors from participating in the Section 271 proceeding, by entering into unfiled agreements which contained provisions wherein the CLECs agreed not to oppose Qwest' 271 application. Qwest then interpreted the agreements as precluding that party's participation in the 271 proceeding. By this action, Qwest precluded two of

its largest wholesale customers from supplying Staff and other parties with their input into the 271 process. Staff also believes that there is some evidence that Qwest attempted to limit Eschelon, and perhaps McLeods, participation in the CMP redesign, a process which is integral to the BOC's obtaining Section 271 relief.

In addition to raising concerns regarding the integrity of this Commission proceeding, Qwest's conduct raises concerns regarding the extent the record was affected as a result of the unfiled agreements. As discussed below, Eschelon, AT&T, McLeod, WorldCom and Covad all expressed concern with the record given the unfiled agreements and the nonparticipation of certain parties. After considerable review and analysis of the facts and comments presented, Staff found that there were omissions in the record, due to the nonparticipation of at least two CLECs. The purpose of the July workshop held by Staff was to allow any CLEC the opportunity to raise any issue which it believed it had been precluded from raising due to an unfiled agreement with Qwest.

B. Effect of CLEC Nonparticipation on 271 Record

To address issues which occurred as a result of the inability of some parties to participate and raise issues in this proceeding, the Staff conducted a workshop on July 30-31, 2002. At the workshop, both Eschelon and McLeod were allowed to raise any issues which they believed that they had been precluded from raising during the course of this proceeding because of unfiled agreements with Qwest. Other parties were allowed to participate in the workshop as well, as long as their issues arose from the new evidence introduced. They were also allowed to raise other issues as well. Staff and its consultants will be issuing a separate report on the July workshop along with recommendations on the issues which went to impasse.

Both Eschelon and McLeod raised issues which they claimed they had been precluded from raising during the course of the Arizona 271 proceeding because of a written and oral agreement with Qwest respectively. Eschelon raised a series of issues relating to Qwest's commercial performance. Eschelon's list of unresolved issues, as summarized in its filing with the FCC on Qwest's five-state application, included the following issues⁸:

1. A Release 10.0 change was preventing CLEC-to-CLEC Orders.
2. Any telephone number coming from a 1FB with CCMS, Centrex 21, Centrex or Centron for conversion to UNE-P or Resale Pots will not flow through.
3. The GUI process is cumbersome and will remain so as long as it continues to rely on so many manual processes.
4. Qwest is dispatching technicians for orders that do not otherwise generally require a dispatch.
5. Qwest does not have back end system records containing the DSL technical information needed for repair of Centron/Centrex Plus lines with DSL.

⁸ See also Exhibit H, Affidavit of F. Lynne Powers.

6. Eschelon experiences inordinate delay when Qwest disconnects the customer's DSL in error.
7. When Eschelon converts a customer from Qwest to Eschelon, Qwest at times disconnects the customer's DSL early.
8. Qwest has no process to migrate an existing CLEC customer (e.g., on resale or UNE-Star) with DSL to UNE-P without bringing the DSL service down.
9. Outages of Qwest's ordering tool to obtain information needed by Eschelon to complete DSL installations.
10. When Qwest provides repair services to its retail customers, Qwest provides a statement of time and materials and applicable charges to the customer at the time the work is completed, but does not do so for its wholesale customers.
11. There have been instances where Qwest is providing a US WEST branded statement to Eschelon's end-user customers and requires them to sign it.
12. Eschelon is not receiving timely bills for maintenance charges.
13. Qwest does not include sufficient information on its bills for maintenance and repair work. For instance, Qwest does not include circuit identification information in Eschelon's bills and also does not include the date of the dispatch or trouble repair.
14. Qwest closes trouble tickets without authorization and with the incorrect cause and disposition codes.
15. Eschelon incurs additional testing charges due to Qwest's use of pair gain.
16. Eschelon and other wholesale customers do not receive accurate customer loss information. Qwest's retail side does receive accurate customer loss information.
17. Inadequate notice of rate and profile changes.
18. Qwest charges rates that are not in Eschelon's Interconnection Agreements.
19. Problems with billing accuracy.
20. Problems with Qwest changing its PID reporting procedures without adequate notice to the CLECs.
21. Qwest was not providing complete and accurate records to Eschelon to bill interexchange carriers access charges.
22. Collocation Issues.
23. CMP problems.
24. Tandem failure events.

McLeod raised the following issues: (1) Qwest's failure to bill McLeod correctly under its Fourth Amendment to the Interconnection Agreement; (2) Qwest's failure to make payments required under various agreements; and, (3) other performance issues that arose in the workshop discussions.

In addition, AT&T, WorldCom and Covad all expressed concern with the record given the unfiled agreements and the nonparticipation of certain parties. As discussed earlier, AT&T stated that Qwest was able to suggest that small CLECs doing business had no complaints, as evidenced by their lack of participation in the Section 271 proceeding. Further, AT&T stated that by not filing the agreements, the nature and extent of the problems being encountered by CLECs were kept out of the record and public eye. AT&T also suggested that favorable treatment provided to certain CLECs may have affected individual CLEC performance for the better, resulting in an inaccurate picture of actual CLEC performance data and affecting overall conclusions in the OSS test. AT&T also suggested that the data reconciliation audit conducted by the Liberty Consulting Group may have been less extensive because of the lack of full CLEC participation.

In response to Staff's data requests, WorldCom listed a host of issues which it claimed needed to be answered relating to the unfiled agreements. Those issues relating to the 271 record include the following;

1. Whether data from CLECs who entered into unfiled agreements was used in OSS test data and relied upon by CGE&Y in its evaluation.
2. Whether CGE&Y reviewed any of the unfiled agreements.
3. Whether Qwest's alleged actions concerning the unfiled agreements impacts the 271 recommendation to be made by the Commission.

CGE&Y stated that it did not believe the OSS test or record concerning the OSS test had been affected as a result of the nonparticipation of some parties. Staff agrees. While the workshop produced some concerns which Staff has asked CGE&Y to follow-up on including some additional data reconciliation work involving Eschelon, it should be noted that Liberty Consulting, not CGE&Y, did the CLEC data reconciliation initially for Arizona. Other than the issues which CGE&Y is addressing, Staff believes that it has a comprehensive record from which to address Eschelon and McLeod's concerns.

Staff believes that the July workshop allowed parties the opportunity to present evidence on any issues which they may have had and which remained unresolved. Staff will be addressing the issues arising from the July workshop in a forthcoming report.

C. Relationship with the Section 252(e) Proceeding

There are two issues arising from the Section 252(e) proceeding which relate to Qwest's application for Section 271 authority. First, Qwest is required under Section 251 and Checklist Item 2 to provide unbundled network elements on a nondiscriminatory basis. Identification of the agreements that should have been filed by Qwest under Section 252(e) and Qwest's filing them for approval with the Commission is an important step in resolving Checklist Item 2 concerns. Qwest has filed for Commission approval, eight of the 28 agreements identified by Staff as well as six other agreements. Fifteen of the

agreements identified by Staff have been terminated or have expired. Qwest disputes the remaining five agreements identified by Staff, stating that it has already filed some of these as part of interconnection agreements with the Commission. Also important is Qwest's commitment to file anything that meets the Staff's definition of an "interconnection agreement" on a going forward basis until the FCC rules on this issue. Staff has also proposed a process whereby Qwest or a CLEC may file agreements under seal in the 252(e) docket about which there may be any confusion. Taken together, the above steps should address the Checklist Item 2 concerns.

The other issue that arises deals with Qwest's past conduct and the 271 public interest criteria. RUCO, AT&T and WorldCom argue that they should have the opportunity to raise the 252(e) issue in the public interest phase of this case. Staff agrees that parties should have the opportunity to raise this issue in the public interest phase of this case, and advise the Commission with respect to the appropriate weight to give it in its overall recommendation to the FCC on whether Qwest's application is in the public interest.

Where the point of disagreement comes, at least between the Staff and AT&T, is whether the 271 proceeding must await the conclusion of the 252(e) proceeding before the 271 proceeding can be concluded. Staff believes that with the Checklist Item 2 concerns addressed on a prospective basis, this proceeding does not have to await the outcome of the 252(e) proceeding for the following reasons. Qwest's past violation of Section 252 is an enforcement issue and is the primary issue being addressed in the Section 252(e) hearing. Staff anticipates that the Commission will craft remedies in that proceeding commensurate with the level of past violations found, and that these remedies will serve the public interest. There is only one additional remedy available to the Commission in the 271 case, i.e., a recommendation that Qwest's application is not in the public interest due to Qwest's past conduct concerning 252(e) filing violations. It is simply not necessary to duplicate the 252(e) facts or record in the public interest portion of this case, or to await the conclusion of the 252(e) case, in order for parties to make their arguments in the public interest phase of this case. The parties can make their arguments today on Qwest's 252(e) filing violations and the weight that should be given to this factor in the Commission's overall recommendation to the FCC.

Further, it was never intended that the public interest phase of the 271 proceeding await resolution of each and every enforcement proceeding that may be pending at any one time against a BOC. This is because by their nature, enforcement proceedings are oftentimes lengthy contested cases which are designed to adjudicate the extent and nature of any past violations and structure remedies which are designed to serve the public interest. If it were intended that all enforcement proceedings would have to end before 271 authorization could be granted, 271 proceedings might conceivably never end, since new enforcement proceedings will always be started. Further, it is important to recognize that the Act was structured in such a way that the FCC would always have the ability to suspend a BOC's authorization, if subsequent circumstances warrant.

In summary, Staff believes that parties should have the opportunity now to file additional comment on the 252(e) filing issue in the public interest phase of this proceeding, and on the weight that should be accorded to this issue by the Commission, when it makes its recommendation to the FCC on Qwest's application. With bifurcation of the 271 related issues and with Checklist Item 2 resolution, Staff does not believe that it is necessary to hold the 271 proceeding in abeyance pending the outcome of the 252(e) enforcement proceeding. Nonetheless, if it is the Commission's desire to hold 271 in abeyance until the conclusion of the 252(e) proceeding, it is certainly a matter within its discretion.

VII. Conclusion

In conclusion, the letters, comments and data request responses that were filed indicate that Qwest, with respect to at least two CLECs, interfered with the Commission's 271 regulatory process, and that the record was incomplete as a result. A sub-docket to the 271 docket should be created to determine the extent to which additional fines and other non-monetary penalties are appropriate, given Qwest's interference with the process. Also, Staff held a workshop in July, 2002, to resolve any record deficiencies. Staff will be issuing a supplemental report on the July, 2002, workshop, and its resolution of the issues raised therein.

Two issues arise from the 252(e) proceeding which affect this case. First, pursuant to Section 251 of the Act and Checklist Item 2, Qwest must provide nondiscriminatory access to unbundled network elements. Identification of the contracts that should be filed in accordance with Section 252(e), their filing by Qwest for Commission approval, and Qwest's commitment to abide by Staff's interpretation of Section 252(e) are important steps in addressing any Checklist Item 2 issues on a prospective basis. The other 271 issue that arises concerns Qwest's past conduct and the weight that should be given in the public interest phase of the 271 case. It is important that in the 252(e) enforcement proceeding, the Commission has broad authority to craft appropriate remedies commensurate with the level of violation found. Staff anticipates that the remedies adopted by the Commission will serve the public interest, making this same exercise unnecessary in the public interest phase of the 271 case.

The additional remedy available in the public interest phase of the 271 case is an adverse 271 public interest recommendation. Staff believes that parties should certainly have the right to comment on the 252(e) issue, and the weight it should be given. This should be done in the public interest phase of this case. The Commission's overall recommendation to the FCC on Qwest's application would then take this into account. It is, therefore, Staff's position that with Checklist Item 2 issues resolved on a prospective basis, and with the enforcement proceeding addressing any past discrimination issues, the Commission can move forward on the two dockets independently.

EXHIBIT A

In the Matter of U S West Communications, Inc.'s Compliance
with § 271 of the Telecommunications Act of 1996

ARIZONA CORPORATION COMMISSION STAFF'S
DATA REQUESTS TO ALL CLEC INTERVENORS
DOCKET NUMBER T-00000A-97-0238

Please provide the following:

- STAFF 1-1: Have you been an active participant in prior ACC proceedings? Please list any proceedings in which you have been active in the last two years.
- STAFF 1-2: Did your company participate in the 271 proceeding in Arizona at any time? Please indicate the time period in which you participated. If your Company elected not to participate, what were the reasons behind its decision?
- STAFF 1-3: If your response to Question 1-2 is yes, please indicate the issues raised by you and whether they were satisfactorily resolved.
- STAFF 1-4: Is there any agreement with Qwest, oral or written, which currently, or has in the past, limited your ability to participate in the Arizona Corporation Commission's ("Commission") Section 271 proceeding?
- STAFF 1-5: If your response to Question 1-4 is yes, would you have actively participated in the proceeding but for such agreement? If applicable, why did your company agree not to participate in the ACC's Section 271 proceeding?
- STAFF 1-6: If your response to Question 1-4 is yes, please describe in detail how your ability to participate was limited.
- STAFF 1-7: If your response to Question 1-4 is yes, how long was your ability to participate affected? Please specify the relevant time period.
- STAFF 1-8: If your response to Question 1-4 is yes, what issues would you have raised if your ability to participate had not been limited by oral or written agreement with Qwest?
- STAFF 1-9: If your response to Question 1-4 is yes, have all of the issues which you would have raised been addressed in the Commission's 271 process? If your response is no, please describe in detail what issues were not addressed that relate to Qwest's compliance with Section 271.

EXHIBIT A

In the Matter of U S West Communications, Inc.'s Compliance
with § 271 of the Telecommunications Act of 1996

ARIZONA CORPORATION COMMISSION STAFF'S
DATA REQUESTS TO ALL CLEC INTERVENORS
DOCKET NUMBER T-00000A-97-0238

- STAFF 1-10: Please describe in detail the consequences to your not being able to raise any unresolved issue contained in your response to the prior question.
- STAFF 1-11: Are you aware of any 271 issue you believe was not adequately addressed in the Arizona 271 proceeding as a result of Qwest's unfiled agreements with certain CLECs? Please describe any such issues in detail.
- STAFF 1-12: Has any agreement between you and Qwest caused you to refrain from raising relevant issues during any other related proceeding? Have you ever refrained from participating in any Commission evidentiary proceeding involving Qwest for any reason. Please discuss in detail any such circumstances.
- STAFF 1-13: If your company has agreed not to participate in any Arizona Commission proceeding, including the 271 proceeding, what benefit did you obtain through your agreement not to participate?
- STAFF 1-14: Please provide copies of any agreements referenced above which have not already been provided to the Commission by either Qwest or your Company.

EXHIBIT B

In the Matter of U S West Communications, Inc.'s Compliance
with § 271 of the Telecommunications Act of 1996

DOCKET NO. T-00000A-97-0238

CLEC Date Request List

Adelphia Business Solutions Operations, Inc.	MCI Telecommunications Corp. (WorldCom)
AFN	McLeod USA
Allegiance Telecom, Inc.	Metropolitan Fiber Systems of Arizona, Inc.
Alltell & ICG	Mountain Telecommunications, Inc.
American Communications Services, Inc.	NAS
Arizona Dial Tone, Inc.	New Edge Networks
AT&T	North County Communications Corporation
AT&T and TCG	NOW Communications, Inc.
Brooks Fiber Communications of Tucson, Inc.	One Point Communications
Caltech International Telecom Corp.	Onfiber Carrier Services, Inc.
Caprock Telecommunications Corp.	Phone Company[The]/Network Services of
Centurytel Solutions, LLC	New Hope
CI ² , Inc.	Quintelco, Inc.
Citizens Long Distance Company	RCN Telecom Services, Inc.
Comm South Companies, Inc.	Reflex Communications, Inc.
Connect!	Rhythm Links
Covad Communications Co.	SBC Telecom, Inc.
Cox Arizona Telecom, LLC	Smoke Signal Communications
Digital Services Corporation	Sprint Communications Company, L.P.
DSLNet Communications, LLC	Staples Communications
e.spire	Talk America, Inc.
El Paso Networks, L.L.C.	Tel West Communications, LLC
Electric Lightwave, Inc.	Telepacific Communications
Ernest Communications, Inc.	Teligent Services, Inc.
Eschelon Telecom of Arizona, Inc.	Tess Communications, Inc.
Excell Agent Service, LLC	Time Warner Telecom, Inc.
Global Crossing Local Services, Inc.	Transamerican Telephone, Inc.
Gobeam Services, Inc.	TRI
GST Telecom	Universal Access of Arizona, Inc.
IG2, Inc.	Verizon Avenue
Intermedia Communications, Inc.	Verizon Select Services, Inc.
IPVoice Communications, Inc.	Vivo Communications-AZ, LLC
Jato Communications Corp.	VYVX, LLC
KMC Telecom V, Inc.	Winstar Wireless of Arizona, Inc.
Level 3 Communications, LLC	WLNI, LLC
Livewire Net	XO Arizona, Inc.
Local Gateway Exchange, Inc.	Z-Tel Communications, Inc.
Long Distance Billing Services, Inc.	
Looking Glass Networks, Inc.	

Docket T-00000B-97-0238

McLeodUSA Responses to Staff

Staff 2:1

Yes, in proceedings directly related to McLeodUSA or its affiliates (certification, change of control, etc.).

Staff 2:2

No. Decisions to participate or not to participate in regulatory proceedings are the result of considerations related to allocation of limited legal/regulatory resources at McLeodUSA. See Response to Staff 2:5.

Staff 2:3

Not applicable.

Staff 2:4

Although it is not clear to McLeodUSA whether the following "limited" its ability to participate in any particular proceeding, McLeodUSA states that it has orally agreed to remain neutral on (neither support nor oppose) Qwest's 271 applications as long as Qwest is in compliance with all our agreements and with all applicable statutes and regulations. McLeodUSA does not have any agreement to stay out of all Qwest-related proceedings.

Staff 2:5

Unknown. As long as Qwest was in compliance there was little or no basis or reason to participate. We have focused legal and regulatory resources on SBC/Ameritech because our problems with them are more severe.

Staff 2:6

See response to Staff 2:4. Assuming that response describes a limitation, there were no other specific limitations.

Staff 2:7

See response to Staff 2:4. Assuming that response describes a limitation, there were no other specific limitations.

Staff 2:8

McLeodUSA does not know what, if any, issues would have been raised in the absence of the statement provided in its response to Staff 2:4.

Staff 2:9

See response to Staff 2:8.

Staff 2:10

See response to Staff 2:5 and 2:8.

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Staff 2:11

Not at this time.

Staff 2:12

No. To the extent that McLeodUSA has not participated in other related proceedings (e.g., UNE pricing), the decision has been the result of considerations related to allocation of limited legal/regulatory resources at McLeodUSA. See response to Staff 2:5.

Staff 2:13

McLeodUSA did not agree "not to participate" in any particular proceeding. See responses to Staff 2:4 and 2:5.

Staff 2:14

See responses to Staff 2:4, 2:5 and 2:13. McLeodUSA believes that all agreements referenced above were provided to either the Commission or Staff by Qwest.

EXHIBIT C

Z-Tel Communications Inc's. Response to Staff's Third Set of Data Requests

- 3:1 Qwest's Performance Assurance Plan (PAP) proposal in Docket No. T-00000A-97-0238.
- 3:2 Yes, Z-Tel participated in PAP proceeding from third Quarter 2000 through 2001.
- 3:3 Z-Tel raised PAP issues concerning PIDs, penalty caps, change management procedures, root cause analysis, the K-Table and the minimum per occurrence penalty.
- 3:4 Yes.
- 3:5 Yes. Z-Tel was asking for expedited interconnection agreement negotiations in 8 Qwest states.
- 3:6 Z-Tel agreed not to participate in any commission proceedings for 60 days.
- 3:7 For a period of 60 days. From May 18, 2001 to July 17, 2001.
- 3:8 None.
- 3:9 Yes.
- 3:10 N/A
- 3:11 None
- 3:12 No.
- 3:13 We were able to implement negotiated interconnection agreements on and expedited basis for 8 states.
- 3:14 It is Z-Tel's understanding that the Memorandum of Understanding with Qwest, dated May 18, 2001, has been provided to the ACC.

EXHIBIT C

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL

Chairman

JIM IRVIN

Commissioner

MARC SPITZER

Commissioner

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S COMPLIANCE
WITH SECTION 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000A-97-0238

RESPONSES OF ESCHELON TELECOM OF ARIZONA, INC. TO ARIZONA CORPORATION COMMISSION STAFF'S DATA REQUESTS TO ALL CLEC INTERVENORS

Date of Response: June 26, 2002

Eschelon Telecom of Arizona, Inc.'s ("Eschelon"), submits the following objections and responses to the Staff's Data Request Numbers 3-1 through 3-13:

GENERAL OBJECTIONS TO ALL DATA REQUESTS

1. Eschelon objects to the Requests to the extent they are vague, over-broad and/or unduly burdensome.
2. Eschelon objects to the Requests to the extent they seek information subject to the attorney-client privilege, work product doctrine, or any other privilege recognized by the State of Arizona and information that is trade secret, confidential, sensitive, competitive in nature or proprietary.
3. Eschelon objects to the Requests to the extent that they seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence.
4. Eschelon objects to the Requests to the extent that they seek a legal conclusion.

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RESPONSES

Subject to, and without waiving, the foregoing objections, Eschelon provides the following Responses.

STAFF 3-1: Have you been an active participant in prior ACC proceedings? Please list any proceedings in which you have been active in the last two years.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response.

Eschelon participated in the ACC 271 proceeding early in the proceeding. See Eschelon's Comments Addressing UNE Combinations, *In re. US WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000); see also Verification of Garth Morrisette (same) (copies enclosed).

Eschelon was a party to the ACC cost case and participated to the extent that limited resources allowed. Because of the nature of a cost case (which requires cost models and expert testimony, etc.), larger carriers have more resources to participate fully, particularly when the location of the proceeding requires travel.

Eschelon petitioned for approval to encumber assets of Eschelon Telecom of Arizona - petition granted in September 2001.

Eschelon petitioned for a waiver of the affiliated interest rules - granted in April 2002.

Qwest's SS7 tariff (Docket T-01051B-0391): Eschelon submitted testimony and discovery (as this was a cost docket). Qwest withdrew the filing.

Eschelon participated in access charge case (Docket T-00000D-00-0672).

Certificate of authority granted - summer of 2000.

Interconnection agreement and amendments were approved on various dates. See Eschelon's Response to Staff Request Number 1:2 in Arizona docket number RT-00000F-02-0271 (list of filed agreements, copy enclosed).

There may be other proceedings, but these are the ones that Eschelon has to list at this time. (A member of the regulatory department has left the company.)

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STAFF 3-2: Did your company participate in the 271 proceeding in Arizona at any time? Please indicate the time period in which you participated. If your Company elected not to participate, what were the reasons behind its decision?

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. Eschelon participated in the ACC 271 proceeding in September and October of 2000. *See Eschelon's Comments Addressing UNE Combinations, In re. US WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000); *see also* Verification of Garth Morrisette (same); *see also* Transcript of Proceedings (October 2000).

Pursuant to the Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (document #6 in the 3-ring binder produced to Staff in response to Staff Request Number 1:2 in Arizona docket number RT-00000F-02-0271) (copy enclosed), Eschelon could not oppose Qwest in the ACC 271 proceeding. Despite Eschelon's arguments to the contrary, Qwest interpreted that agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the 271/SGAT proceedings. *See Eschelon's Response to Qwest's letter to Commissioner Marc Spitzer in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238* (June 24, 2002) (copy enclosed and incorporated by reference).

STAFF 3-3: If your response to Question 3-2 is yes, please indicate the issues raised by you and whether they were satisfactorily resolved.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response.

With respect to issues raised, *see Eschelon's Comments Addressing UNE Combinations, In re. US WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000); *see also* Verification of Garth Morrisette (same) (copies enclosed and incorporated by reference).

The issues were not all resolved satisfactorily. *See Eschelon's Response to Qwest's letter to Commissioner Marc Spitzer in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238* (June 24, 2002), Affidavit of F. Lynne Powers (with exhibits), Affidavit of Ellen Copley (with exhibit), and email to Andrew Crain and Charles Steese (copies enclosed and incorporated by reference). *See also, e.g., Qwest Report Card, March 2002* (detail included with Report Card is confidential/trade secret and contains customer-identifying information and competitively sensitive material. Please afford all protection under confidentiality protective order.).

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STAFF 3-4: Is there any agreement, oral or written, which currently, or has in the past, limited your ability to participate in the Arizona Corporation Commission's ("Commission") Section 271 proceeding?

Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. Yes. See Response to Staff Request Number 3-2; see also Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (document #6 in the 3-ring binder produced to Staff in response to Staff Request Number 1:2 in Arizona docket number RT-00000F-02-0271) (copy enclosed).

STAFF 3-5: If your response to Question 3-4 is yes, would you have actively participated in the proceeding but for such agreement? If applicable, why did your company agree not to participate in the ACC's Section 271 proceeding?

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. Yes. Although resource constraints may have meant that Eschelon could not participate as fully as larger CLECs, Eschelon would have participated in the proceeding as actively as possible. See Response to Staff Request Numbers 3-2, 3-9, and 3-11.

STAFF 3-6: If your response to Question 3-4 is yes, please describe in detail how your ability to participate was limited.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. See Response to Staff Request Numbers 3-2, 3-9, and 3-11.

STAFF 3-7: If your response to Question 3-4 is yes, how long was your ability to participate affected? Please specify the relevant time period.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. November 15, 2000 through February 28, 2002.

STAFF 3-8: If your response to Question 3-4 is yes, what issues would you have raised if your ability to participate had not been limited by oral or written agreement?

RESPONSE: See Response to Staff Request Numbers 3-3, 3-9, and 3-11.

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STAFF 3-9: If your response to Question 3-4 is yes, have all of the issues which you would have raised been addressed in the Commission's 271 process? If your response is no, please describe in detail what issues were not addressed that relate to Qwest's compliance with Section 271.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. Because Eschelon could not participate, Eschelon does not know whether all issues have been addressed. Eschelon would have raised switched access, billing, UNE-E/UNE-Star, UNE-P, collocation, and other issues, such as those described in the enclosed documents. Eschelon is not aware of any resolution to UNE-E/UNE-Star issues in the 271 proceeding. Examples of other issues that Eschelon would have raised include the SGAT provisions relating to Category 11 records and miscellaneous maintenance charges. The SGAT appears to allow Qwest to recover costs in situations in which CLECs should also be able to bill Qwest for the same costs, but the SGAT does not appear to address the CLEC recovery issue. With respect to maintenance charges, for example, Eschelon understands that the interconnection agreements between Qwest and TCG in Arizona, Iowa, Nebraska, and Utah contain the following language (emphasis added) regarding reciprocal charges:

"II. NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS

A. Loops

12. Maintenance and Testing. TCG is responsible for receiving and coordinating resolution of all end user trouble reports involving Loop Service. TCG will isolate any trouble to the Loop portion of the service before contacting USWC to report the trouble. USWC will charge TCG additional labor billing charges (at USW tariffed rates) when the trouble is referred to USWC and the trouble is found to be either on the customer side of the NID or on the TCG side of the POI or collocation POT Bay. In the event that USWC reports no trouble found, and it is subsequently determined that there was a trouble on USWC's side of the POI (excluding an intermittent trouble), *TCG will charge USWC additional labor billing charges (at TCG tariffed rates) associated with testing for the trouble.* Each party will provide to the other Party the results of any testing that is undertaken pursuant to this paragraph." Eschelon would have requested similar language in the SGAT to address such situations.

Additionally, Eschelon would have asked Qwest to ensure, through the SGAT, that CLECs receive notification, at the time of the activity, if a charge will be applied, because CLECs should not have to wait until the bill arrives to discover that Qwest charged for an activity. CLEC needs to know at the time of the event that a charge will apply. Immediately after the work is completed, Qwest needs to send CLEC a statement of services performed, testing results, and applicable charges (by telephone number) that will appear on CLEC's next invoice. If Qwest is claiming that a charge was authorized, a process should also be in place to provide timely documentation as to who authorized the charge. Because CLECs must wait until the bill is received, it is a huge task to go back and analyze

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what happened in each situation and whether a charge should have been applied. Although Qwest provides the charge to retail customers at the time of the activity (and not much later, when the bill arrives), Qwest does not do so for CLEC customers.

These are just examples of the type of issues that Eschelon could have raised.

Although the SGAT proceedings were essentially multi-party interconnection agreement negotiations, Eschelon was precluded from participating in those negotiations. Nonetheless, and even though Eschelon has not opted in to any SGAT, Qwest is already charging SGAT rates to Eschelon in some cases. Qwest also uses the SGAT as a template in negotiations. Eschelon would have benefited from the 271/SGAT discussions explaining that template, in addition to having an opportunity to impact the language, if it could have participated in the 271/SGAT proceedings. Eschelon has had to attempt to negotiate an interconnection agreement on its own. Qwest and Eschelon have reached impasse for a number of issues. *See, e.g.* enclosed emails regarding collocation impasse issues. Eschelon does not know whether all of these issues were addressed in the 271/SGAT proceedings.

STAFF 3-10: Please describe in detail the consequences to your not being able to raise any unresolved issue contained in your response to the prior question.

RESPONSE: *See* Response to Staff Request Numbers 3-3, 3-9, and 3-11.

STAFF 3-11: Are you aware of any 271 issue you believe was not adequately addressed in the Arizona 271 proceeding as a result of Qwest's unfiled agreements with certain CLECs? Please describe any such issues in detail.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. *See* Response to Staff Request Numbers 3-3 and 3-9. Generally, Eschelon has a different business plan from other carriers that participated in the 271 proceedings (such as AT&T and WCOM). Also, Eschelon believes that it is currently doing more CLEC business in Qwest territory, with respect to a wider variety of Qwest products and services, than some other CLECs. Therefore, Eschelon has had live business examples of commercial performance, as well as a different perspective, that Eschelon could have brought to the 271 proceedings.

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STAFF 3-12: Has any agreement between you and Qwest caused you to refrain from raising relevant issues during any other related proceeding? Have you ever refrained from participating in any Commission evidentiary proceeding involving Qwest for any reason. Please discuss in detail any such circumstances.

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. Pursuant to the Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (document #6 in the 3-ring binder produced to Staff in response to Staff Request Number 1:2 in Arizona docket number RT-00000F-02-0271), Eschelon could not file complaints before any regulatory body concerning issues arising out of the Parties' Interconnection Agreements. Eschelon would have filed complaints without this restriction. In addition to the 271 proceedings, Qwest caused Eschelon to refrain from certain aspects of participation in the Change Management Process ("CMP") and CMP Redesign. *See* Eschelon's Response to Qwest's letter to Commissioner Marc Spitzer in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238 (June 24, 2002). Generally, Qwest asked Eschelon not to raise problems with other CLECs, in proceedings, or publicly. *See id.* The Escalation Letter did provide that Eschelon may participate in regulatory cost dockets or dockets regarding the establishment of rates.

As discussed in Response to Staff Request Number 3-1, resource constraints at times cause Eschelon to limit participation in proceedings.

STAFF 3-13: If your company has agreed not to participate in any Arizona Commission proceeding, including the 271 proceeding, what benefit did you obtain through your agreement not to participate?

RESPONSE: Subject to, and without waiving, the foregoing objections, Eschelon provides this Response. *See* Eschelon's Response to Staff Request Numbers 3-3 and 3-9; *see also* Eschelon's Response to Staff Request Number 1:2 and 2-4 in Arizona docket number RT-00000F-02-0271.

Individuals with information are identified in the documents produced to Staff in this docket and the RT-00000F-02-0271 proceeding. Also, questions may be directed to:

J. Jeffery Oxley
Vice President, General Counsel and Corporate Secretary
Eschelon Telecom, Inc.
730 Second Avenue South, Suite 1200
Minneapolis, MN 55402
612-436-6692

EXHIBIT D

In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the
Telecommunications Act of 1996

ARIZONA CORPORATION COMMISSION STAFF'S DATA REQUESTS TO CONSULTANTS DOCKET NO. T-00000B-97-0238

- STAFF 1-01: Please indicate, by each of the five tests performed, whether your test activities were: 1) not dependent upon CLEC input; 2) partially dependent upon CLEC input; or 3) heavily dependent upon CLEC input. Please give a detailed explanation of your response in each instance.
- STAFF 1-02: Of the evaluations falling into Categories 2 and 3, please provide the name and a brief description of the involvement of CLECs participating in each evaluation. This description should include the nature and extent that the CLEC was involved (e.g. CLEC provided facilities for CGE&Y or HP to use, CLEC actually input service request, etc.).
- STAFF 1-03: Of the evaluations falling into Categories 2 and 3, please indicate the efforts of CGE&Y and HP to obtain CLEC involvement where necessary to obtain a balanced and accurate evaluation.
- STAFF 1-04: Of the evaluations falling into Categories 2 and 3, please provide a description of any data or information provided by CLECs that was used in the findings and/or conclusions of the evaluation. Please separately identify each CLEC, the data or information provided by that CLEC, and how it was used or relied upon in any findings and/or conclusions.
- STAFF 1-05: Provide your expert opinion on whether any CLEC provided information or data relied on in the test findings improperly influenced the outcomes of the various tests performed. Please give a detailed explanation of your response in each instance.
- STAFF 1-06: Did the nonparticipation of any CLEC improperly influence the outcome of the various tests performed. Please give a detailed explanation of your response in each instance. If your answer is yes, please give a detailed explanation of how the outcome was improperly influenced by a CLEC's nonparticipation and what should be done to correct the outcome at this time.
- STAFF 1-07: In comparison to other 271 engagements that you are familiar with, did the Arizona test encourage CLEC participation at all stages to the same extent and allow CLECs the same degree of participation as other Section 271 engagements.
- STAFF 1-08: Having reviewed the responses of the CLECs to the recent Staff data requests in the Section 271 proceeding, were there any concerns raised by the CLECs which lead you to conclude that any test results were compromised or that the testing performed was inadequate. Please give a detailed explanation of your response in any testing area identified.



STAFF 1-1: Please indicate, by each of the five tests performed, whether your test activities were: 1) not dependent upon CLEC input; 2) partially dependent upon CLEC input; or 3) heavily dependent upon CLEC input. Please give a detailed explanation of your response in each instance.

CGE&Y Response to Staff Data Request 1-1:

General Response:

In responding to Staff Data Request 1-1, CGE&Y defines "CLEC input" to include only input from commercial CLECs, i.e., not to include input from the Psuedo-CLEC, as well as to include only CLEC input required by the design of the test, as provided in the Master Test Plan (MTP) and Test Standards Document (TSD). In addition to that required or designed level of input, CGE&Y and the ACC Staff received CLEC input as to the overall test process, on specific tests during Test Advisory Group (TAG) meetings, and during the Interim and Final Workshop process. See Final Report dated May 3, 2002, at Executive Summary, pages 13-14.

All of the test activities in Arizona were influenced by input from the participating CLECs in that they were allowed/encouraged to provide input to any and all documents (IWOs, interim reports, TAG meeting minutes, etc.). Some of their comments resulted in more in-depth testing and research into Qwest OSS.

Finally, CGE&Y notes that in analyzing test data and providing its findings in its Final Report, CGE&Y reviewed comments from all parties against actual and documented observations of the Pseudo-CLEC as well as performance results, which CGE&Y determined were reliable through a comprehensive audit and data reconciliation.

Specific Response:

Subject to the foregoing General Response, CGE&Y states that:

► Capacity Test

The execution of the Capacity Test was not dependent on CLEC input. As described more fully in the Capacity Test Section of its Final Report, CGE&Y used the Psuedo-CLEC for the execution of the Capacity Test.

► Functionality Test

The Functionality Test relied on data and observations of the Psuedo-CLEC except in the evaluation of performance metrics where commercial CLEC results were also considered where sufficient commercial volume existed. In addition, four CLECs: AT&T, Covad, WCOM and Cox, provided data for or assisted with execution of certain tests where Commercial CLEC facilities were required, as more fully described in the Functionality Section of CGE&Y's Final Report.



Although CLECs participated in these limited test execution activities, all conclusions from the Functionality Test were drawn from test data and/or aggregate CLEC results once the accuracy of such results were validated through the PMA, data reconciliation and comparison of functionality test results (See Functionality Test Results Comparison Report (FTRC)).

► Relationship Management Evaluation

RME was partially dependent upon CLEC input. CLEC input was repeatedly solicited, but due to limited response, the majority of input came from the Pseudo-CLEC supplemented by extensive research by CGE&Y.

► Retail Parity Evaluation

RPE was not dependent upon CLEC input. WCOM provided access to EB-TA/IMA-EDI for CGE&Y to perform limited test scripts.

► Performance Measurement Audit

No PMA test activities were dependent upon CLEC input. CLEC data used to conduct the PMA was provided by Qwest.

HP Response to Staff Data Request 1-1:

Test	CLEC Input to Test
Capacity	Not dependent upon CLEC input.
Functionality	Not dependent upon CLEC input (for additional information, see the responses to 1-2, 1-3, and 1-4 below).
Relationship Management Evaluation	Not dependent upon CLEC input.
Retail Parity Evaluation	Not dependent upon CLEC input.
Performance Measurement Audit (PMA)	Not dependent upon CLEC input.

STAFF 1-2: *Of the evaluations falling into Categories 2 and 3, please provide the name and a brief description of the involvement of CLECs participating in each evaluation. This description should include the nature and extent that the CLEC was involved (e.g. CLEC provided facilities for CGE&Y or HP to use, CLEC actually input service request, etc.).*

CGE&Y Response to Staff Data Request 1-2:

► Capacity Test
N/A

► Functionality Test
See CGE&Y's response to Staff Data Request 1-1.

► Relationship Management Evaluation
Questionnaires were sent to 43 CLECs. Seven questionnaires were received back on account establishment; seven on account management; seven on training; six on interface development – EDI/IMA-GUI; and six on Qwest Co-Provider Industry Change Management Process. The responses were received from AT&T, WCOM, Eschelon, Sprint, McLeod, Mainstreet and NorthPoint.

CGE&Y conducted in-person interviews with Qwest personnel representing the CLEC account establishment, account management, EDI/IMA interface development, and the CICMP processes. CGE&Y also attended a meeting of the CLEC Forum, a group of representatives of the CLECs that participate in the CICMP, which afforded the opportunity to interview those present regarding CICMP and other matters. CGE&Y also conducted telephone interviews with participating CLEC personnel involved in contract management, systems and process change management, and interface development and testing activities with Qwest. Informal interviews were conducted with certain CLECs throughout the duration of the evaluation.

► Retail Parity Evaluation
See CGE&Y's response to Staff Data Request 1-1.

► Performance Measurement Audit
N/A

HP Response to Staff Data Request 1-2:

Test	CLEC Input to Test	Description of CLEC Participation
Functionality	Not dependent upon CLEC input.	AT&T provided Central Office facilities to support test scenarios involving coordinated cuts and UNE-Loop orders.



STAFF 1-3: *Of the evaluations falling into Categories 2 and 3, please indicate the efforts of CGE&Y and HP to obtain CLEC involvement where necessary to obtain a balanced and accurate evaluation.*

CGE&Y Response to Staff Data Request 1-3:

In responding to Staff Data Request 1-3, CGE&Y interprets the phrase "where necessary to obtain a balanced and accurate evaluation," to mean "consistent with the requirements of the TSD and MTP and sufficient, in CGE&Y's professional opinion, to make the findings contained in its report."

► Capacity Test
N/A

► Functionality Test
N/A

► Relationship Management Evaluation
CGE&Y, with the support and assistance of the ACC Staff, repeatedly made formal requests to obtain CLEC participation.

► Retail Parity Evaluation
N/A

► Performance Measurement Audit
N/A

HP Response to Staff Data Request 1-3:

Test	CLEC Input to Test	Description of CLEC Participation	HP efforts to obtain CLEC involvement
Functionality	Not dependent upon CLEC input.	AT&T provided Central Office facilities to support test scenarios involving coordinated cuts and UNE-Loop orders.	None. This activity was coordinated by CGE&Y.



STAFF 1-4: *Of the evaluations falling into Categories 2 and 3, please provide a description of any data or information provided by CLECs that was used in the findings and/or conclusions of the evaluation. Please separately identify each CLEC, the data or information provided by that CLEC, and how it was used or relied upon in any findings and/or conclusions.*

CGE&Y Response to Staff Data Request 1-4:

► Capacity Test
N/A

► Functionality Test

The completion time of the hot cuts provided by AT&T (see HP's response below) was used in the Functionality Test Results Comparison Report in the calculation of the OP-7 measurement. Results for average hot cut intervals using Qwest adhoc and Pseudo-CLEC data (which included the AT&T provided completion time) indicated a difference of 0:16:18. CGE&Y found that the difference in the hot cut intervals was explained by the different data elements used in the adhoc and Pseudo-CLEC calculations. The Pseudo-CLEC calculation was based on the time Qwest notified CGE&Y that the cut was going to begin and ended the time AT&T notified HP that the testing was complete, whereas the adhoc calculation was based on the lift and lay times as per version 6.3 of the PID. CGE&Y found the 16-minute difference was due to the time taken to test the loop upon completion of the cut. (See Section 4.5 of the Functionality Test Results Comparison Report)

► Relationship Management Evaluation

Questionnaires were sent to 43 CLECs. Seven questionnaires were received back on account establishment; seven on account management; seven on training; six on interface development – EDI/IMA-GUI; and six on Qwest Co-Provider Industry Change Management Process. The responses were received from AT&T, WCOM, Eschelon, Sprint, McLeod, Mainstreet and NorthPoint.

CGE&Y conducted in-person interviews with Qwest personnel representing the CLEC account establishment, account management, EDI/IMA interface development, and the CICMP processes. CGE&Y also attended a meeting of the CLEC Forum, a group of representatives of the CLECs that participate in the CICMP, which afforded the opportunity to interview those present regarding CICMP and other matters. CGE&Y also conducted telephone interviews with participating CLEC personnel involved in contract management, systems and process change management, and interface development and testing activities with Qwest. Informal interviews were conducted with certain CLECs throughout the duration of the evaluation.

► Retail Parity Evaluation



EXHIBIT D



N/A

► Performance Measurement Audit
N/A

HP Response to Staff Data Request 1-4:

Test	CLEC Input to Test	Description of CLEC Participation	Description of data/information provided by CLECs
Functionality	Not dependent upon CLEC input.	AT&T provided Central Office facilities to support test scenarios involving coordinated cuts and UNE-Loop orders.	AT&T advised HP when the AT&T hot cut activities were completed.

STAFF 1-5: Provide your expert opinion on whether any CLEC provided information or data relied on in the test findings improperly influenced the outcomes of the various tests performed. Please give a detailed explanation of your response in each instance.

CGE&Y Response to Staff Data Request 1-5:

CGE&Y confirms that its findings in the Final Report are fully supported by the data and information it received and relied upon during the OSS test, as detailed and more fully described in its Final Report. CGE&Y does state that it was not, and is not now, aware of any information or data that "improperly influenced" the OSS test.

HP Response to Staff Data Request 1-5:

HP confirms that no CLEC-provided information or data relied on in the test results improperly influenced the outcome of any test that HP performed.



STAFF 1-6: Did the nonparticipation of any CLEC improperly influence the outcome of the various tests performed. Please give a detailed explanation of your response in each instance. If your answer is yes, please give a detailed explanation of how the outcome was improperly influenced by a CLEC's nonparticipation and what should be done to correct the outcome at this time.

CGE&Y Response to Staff Data Request 1-6:

It is CGE&Y's professional opinion that all OSS testing requirements in the MTP and TSD were satisfied. CGE&Y is not aware of any instance in which the outcomes of any of the OSS tests performed were improperly influenced by a CLEC's nonparticipation. See also CGE&Y Response to Staff Data Request 1-8.

HP Response to Staff Data Request 1-6:

HP has no opinion regarding the effect, or lack thereof, of the nonparticipation of any CLEC in this proceeding.



STAFF 1-7: In comparison to other 271 engagements that you are familiar with, did the Arizona test encourage CLEC participation at all stages to the same extent and allow CLECs the same degree of participation as other Section 271 engagements.

CGE&Y Response to Staff Data Request 1-7:

CGE&Y believes, as it stated in its Final Report, that the Arizona OSS test was the most open and collaborative OSS test of which CGE&Y is aware. The ACC took unprecedented steps to ensure that the test process would remain completely "open," i.e., all parties would be afforded every opportunity to participate in the test, thoroughly review and analyze the results in an open forum, raise issues during each phase of the test, and be availed to providing input as appropriate.

See Final Report dated May 3, 2002 at Executive Summary pages 13-14.

HP Response to Staff Data Request 1-7:

Each of the 271 tests had a unique set of requirements. It is our opinion that of the five 271 tests in which HP has participated, the Arizona test was the most broad and comprehensive and was fully open to CLEC participation throughout the duration of the engagement.



STAFF 1-8: *Having reviewed the responses of the CLECs to the recent Staff data requests in the Section 271 proceeding, were there any concerns raised by the CLECs which lead you to conclude that any test results were compromised or that the testing performed was inadequate. Please give a detailed explanation of your response in any testing area identified.*

CGE&Y Response to Staff Data Request 1-8:

After having reviewed the responses from Eschelon, AT&T, WCOM and Covad that Staff provided to CGE&Y, it is the opinion of CGE&Y that none of the concerns raised in those comments lead CGE&Y to conclude that any test results were compromised or that the testing performed was inadequate.

HP Response to Staff Data Request 1-8:

HP reviewed the **responses** to the following Staff Data Requests as received by CGE&Y:

Company	Data Request 1	Data Request 2	Data Request 3	Data Request 4
Eschelon		X	X	
AT&T				X
WorldCom		X	X	
Covad		X	X	

Based on our review of the responses, HP does not believe that any test results were compromised during the test or that the testing was inadequate. Further, HP believes that the Arizona test was broad, comprehensive and fully open to CLEC participation throughout the duration of the engagement.

EXHIBIT E

In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the
Telecommunications Act of 1996

ARIZONA CORPORATION COMMISSION STAFF'S SECOND SET OF DATA REQUESTS TO CONSULTANTS DOCKET NO. T-00000B-97-0238

This second set of data request is the same as the first except for expansion of scope. This is in response to the discussion at the final supplemental workshop held July 30 and July 31. The scope should not be limited to test execution. "Test activities" should include CLEC participation in the design, planning and development phases as well as the execution phase of the test.

- STAFF 2-1: Please indicate, by each of the five tests performed, whether your test activities including the design, planning and development phases as well as the execution phase were: 1) not dependent upon CLEC input; 2) partially dependent upon CLEC input; or 3) heavily dependent upon CLEC input. Please give a detailed explanation of your response in each instance.
- STAFF 2-2: Of the evaluations falling into Categories 2 and 3, please provide the name and a brief description of the involvement of CLECs participating in each evaluation. This description should include the nature and extent that the CLEC was involved (e.g. CLEC provided facilities for CGE&Y or HP to use, CLEC actually input service request, etc.).
- STAFF 2-3: Of the evaluations falling into Categories 2 and 3, please indicate the efforts of CGE&Y and HP to obtain CLEC involvement where necessary to obtain a balanced and accurate evaluation.
- STAFF 2-4: Of the evaluations falling into Categories 2 and 3, please provide a description of any data or information provided by CLECs that was used in the findings and/or conclusions of the evaluation. Please separately identify each CLEC, the data or information provided by that CLEC, and how it was used or relied upon in any findings and/or conclusions.
- STAFF 2-5: Provide your expert opinion on whether any CLEC provided information or data relied on in the test findings improperly influenced the outcomes of the various tests performed. Please give a detailed explanation of your response in each instance.

EXHIBIT E

In the Matter of U S West Communications, Inc.'s Compliance with § 271 of the
Telecommunications Act of 1996

**ARIZONA CORPORATION COMMISSION STAFF'S
SECOND SET OF DATA REQUESTS TO CONSULTANTS
DOCKET NO. T-00000B-97-0238**

- STAFF 2-6: Did the nonparticipation of any CLEC improperly influence the outcome of the various tests performed. Please give a detailed explanation of your response in each instance. If your answer is yes, please give a detailed explanation of how the outcome was improperly influenced by a CLEC's nonparticipation and what should be done to correct the outcome at this time.
- STAFF 2-7: In comparison to other 271 engagements that you are familiar with, did the Arizona test encourage CLEC participation at all stages to the same extent and allow CLECs the same degree of participation as other Section 271 engagements.
- STAFF 2-8: Having reviewed the responses of the CLECs to the recent Staff data requests in the Section 271 proceeding and the CLECs comments in the July 30 & 31 workshop, were there any concerns raised by the CLECs which lead you to conclude that any test results were compromised or that the testing performed was inadequate. Please give a detailed explanation of your response in any testing area identified.



STAFF 2-1: Please indicate, by each of the five tests performed, whether your test activities including the design, planning and development phases as well as the execution phase were: 1) not dependent upon CLEC input; 2) partially dependent upon CLEC input; or 3) heavily dependent upon CLEC input. Please give a detailed explanation of your response in each instance.

CGE&Y Response to Staff Data Request 2-1:

Please see CGE&Y's Response to Staff Data Request 1-1, for CGE&Y's response as to the "execution phase" of the test.

As to the design, planning and development phases of the test, CGE&Y states that its test activities were partially dependent upon CLEC input for each of the five tests: Capacity, Functionality, Relationship Management, Retail Parity, and Performance Measurement.

Please see CGE&Y's Final Report at the pages noted below, for a summary of CLEC input into the design, planning and development phases of each respective test:

Executive Summary - Overall Test Planning and Development Pages 12-13:

In January 2000, the TAG determined that a more detailed test plan should be developed to supplement the MTP. Working in a collaborative effort for more than five months, the TAG developed such a plan, which is known as the Test Standards Document (TSD). One of the major requirements of the TSD was for CGE&Y, as Test Administrator, to identify suspected deficiencies in Qwest OSS and issue Incident Work Orders (IWOs), which were to be distributed to all TAG members for review and comment. All test participants were also encouraged to bring suspected deficiencies to the attention of the Test Administrator for review. Qwest was required to provide a response to each IWO. All parties were then allowed an opportunity to comment on Qwest's response and CGE&Y's evaluation. CGE&Y carefully reviewed the parties' comments and determined whether additional information, testing or evaluation was necessary. Once CGE&Y verified that the issue identified in the IWO was satisfactorily addressed by Qwest, a Performance Acceptance Certificate (PAC) was distributed to all parties and the IWO was closed. Any party that disagreed with that closure could raise their concerns at regularly scheduled TAG meetings. If the parties could not reach agreement on the closure, the IWO was sent to "impasse," i.e., referred to the ACC for resolution. Of the more than 230 IWOs issued during the OSS Test, and the 128 issued during the Performance Measurement Audit (PMA) and closed by CGE&Y during the test, only 6 were taken to impasse by any party.

In designing the Arizona §271 test, the ACC took unprecedented steps to ensure that the test process would remain completely "open," i.e., all parties would be afforded every opportunity to participate in the test, thoroughly review and analyze the results in an open forum, and raise issues during each phase of the test. This openness policy was



developed by the ACC and is described in Appendix F of the MTP. CGE&Y operated in accordance with this policy to ensure that openness was achieved during each phase of the Qwest OSS test.

► Capacity Test – Executive Summary page 22:

A Capacity Subcommittee was formed in February 2000 as a subgroup of the Arizona TAG to address the technical issues associated with the Capacity Test. This committee met more than 30 times during this engagement, affording members every opportunity to provide input to the process. One of the tasks of the Capacity Subcommittee was to recommend order volumes for the test. Qwest provided the subcommittee a forecast of the projected CLEC volumes by product type and by state. The subcommittee reviewed the data, and with full CLEC participation, reached a consensus on the order volume to be used in the test. These volumes included projected demand for the entire Qwest 14-state region. After preparation activities for the test were complete, five separate Operational Readiness Tests (ORTs) were performed to ensure that all test orders would flow through as anticipated.

► Functionality Test – Executive Summary page 15:

As part of the collaborative effort, the Functionality Test was designed by the TAG to be executed in phases aligned with these areas. To further ensure an open test environment, each phase of the test required approval by all TAG members prior to execution. The execution of each phase would begin as the PMA was completed on the specific measures pertaining to that phase. Completion of a phase of the PMA included analyzing the findings and results of the applicable measures during the TAG meetings to ensure that all parties were satisfied. After agreement was reached, that phase of the Functionality Test could begin.

► Relationship Management Evaluation – Executive Summary page 24

In accordance with TSD requirements, CGE&Y conducted interviews with various members of the CLEC community to collect information about their experiences in dealing with Qwest. CGE&Y also conducted in-person interviews with Qwest personnel representing the CLEC account establishment, account management, EDI/IMA interface development, and the CMP. CGE&Y also sent questionnaires electronically to CLECs that conduct business or intend to conduct business in the state of Arizona. The questionnaires were used to collect additional information from the CLECs about their overall experiences in dealing with Qwest.

► Retail Parity Evaluation – Executive Summary page 20:

RPE test scripts were designed to limit the evaluation to areas of similarities between retail and wholesale in submitting pre-order and order transactions. Test scripts were tested for accuracy and approved by the TAG.

As a result of the RPE interim workshop, a Retail Parity re-evaluation was conducted in the fall of 2001. This evaluation addressed specific areas of concern raised by the parties. The major issues addressed included the number of fields and steps required



to enter an order, pre-order response times, pre-order to order integration, and reservation of vanity Telephone Numbers (TNs) and large blocks of TNs. To re-evaluate these issues, 28 paired test scripts were executed as well as using a select group of test script results that were executed during the Functionality retest. The results of the re-evaluation subsequently led to the closure of 3 IWOs.

► Performance Measurement Audit – Executive Summary page 13:

At the outset of the Qwest Arizona OSS Test, the TAG also decided that CGE&Y would conduct an extensive PMA. The PMA was the first of its kind, unique to Arizona and addresses concerns raised in other jurisdictions as to the accuracy of the BOC's reported performance measurement results. This is especially important as the volume of services provided by CLECs increases and future determinations of quality of service provided by the BOCs is based on published performance measurement results.

The Arizona PMA was originally intended to ensure that the results from the test would be accurately calculated and reported. The TAG was an integral part of this process. Numerous TAG meetings were held during which the sections of the PMA were discussed and agreement was reached by the TAG that the audit results were satisfactory and OSS testing of the particular function could begin. During the PMA, CGE&Y identified numerous deficiencies resulting in the issuance of 128 IWOs, all of which were resolved by Qwest by the fall of 2001.



STAFF 2-2: Of the evaluations falling into Categories 2 and 3, please provide the name and a brief description of the involvement of CLECs participating in each evaluation. This description should include the nature and extent that the CLEC was involved (e.g. CLEC provided facilities for CGE&Y or HP to use, CLEC actually input service request, etc.).

CGE&Y Response to Staff Data Request 2-2:

Please see CGE&Y's response to Staff Data Request 1-2 and CGE&Y's response to Staff Data Request 2-1. CGE&Y does not recall each instance of each individual CLEC's input for the design, planning and development phases of each test. Participation of each CLEC in the design, planning and development phases of the test would be reflected in the minutes of TAG meetings, in responses and comments to IWOs, in other documents in the test record, and in the transcripts of various Workshops conducted in this proceeding, which have been made available to all parties in this proceeding.



STAFF 2-3: Of the evaluations falling into Categories 2 and 3, please indicate the efforts of CGE&Y and HP to obtain CLEC involvement where necessary to obtain a balanced and accurate evaluation.

CGE&Y Response to Staff Data Request 2-3:

Please see CGE&Y's Response to Staff Data Request 1-3 as to the execution phase of each test. As to the design, planning and development phases of each test, please see the Executive Summary of CGE&Y's Final Report and CGE&Y's Response to Staff Data Request 2-1.



STAFF 2-4: *Of the evaluations falling into Categories 2 and 3, please provide a description of any data or information provided by CLECs that was used in the findings and/or conclusions of the evaluation. Please separately identify each CLEC, the data or information provided by that CLEC, and how it was used or relied upon in any findings and/or conclusions.*

CGE&Y Response to Staff Data Request 2-4:

See CGE&Y's response to Staff Data Request 1-4. In addition, as stated in CGE&Y's Response to Staff Data Request 2-2, CLECs provided responses and comments to IWOs that CGE&Y issued during the test. CGE&Y reviewed those comments, as reflected in the documentation of each such IWO. Each of those IWOs identifies the CLECs providing such information, and each contains both the CLECs' responses and comments as well as CGE&Y's evaluation and findings related to each such IWO. CGE&Y also received comments from the CLECs during the workshop process that were reviewed before CGE&Y issued its Final Report. Each of those comments are reflected in the respective Workshop Transcripts, which would identify each CLEC. CGE&Y's Final Report at page 14, describes how CGE&Y used this information in its Final Report.



STAFF 2-5: Provide your expert opinion on whether any CLEC provided information or data relied on in the test findings improperly influenced the outcomes of the various tests performed. Please give a detailed explanation of your response in each instance.

CGE&Y Response to Staff Data Request 2-5:

CGE&Y confirms that its findings in the Final Report are fully supported by the data and information it received and relied upon during the OSS test, as detailed and more fully described in its Final Report. CGE&Y further states that it was not, and is not now, aware of any information or data that "improperly influenced" the OSS test.



STAFF 2-6: Did the nonparticipation of any CLEC improperly influence the outcome of the various tests performed. Please give a detailed explanation of your response in each instance. If your answer is yes, please give a detailed explanation of how the outcome was improperly influenced by a CLEC's nonparticipation and what should be done to correct the outcome at this time.

CGE&Y Response to Staff Data Request 2-6:

It is CGE&Y's professional opinion that all OSS testing requirements in the MTP and TSD were satisfied. CGE&Y is not aware of any instance in which the outcomes of any of the OSS tests performed were improperly influenced by a CLEC's nonparticipation.

See also CGE&Y's Response to Staff Data Request 1-8.



STAFF 2-7: In comparison to other 271 engagements that you are familiar with, did the Arizona test encourage CLEC participation at all stages to the same extent and allow CLECs the same degree of participation as other Section 271 engagements.

CGE&Y Response to Staff Data Request 2-7:

See CGE&Y's Response to Staff Data Request 1-7.



STAFF 2-8: Having reviewed the responses of the CLECs to the recent Staff data requests in the Section 271 proceeding, were there any concerns raised by the CLECs which lead you to conclude that any test results were compromised or that the testing performed was inadequate. Please give a detailed explanation of your response in any testing area identified.

CGE&Y Response to Staff Data Request 2-8:

No. See also CGE&Y's Response to Staff Data Request 1-8.

EXHIBIT F

CONFIDENTIAL

AND

PROPRIETARY

RECEIVED

JUN 01 2002



June 24, 2002

LEGAL DIV.
ARIZ. CORPORATION COMMISSION*By facsimile & U.S. mail*

Commissioner Marc Spitzer
 Arizona Corporation Commission
 1200 West Washington
 Phoenix, Arizona 85007-2996

Re: Qwest's June 18, 2002 Letter to Commissioner Marc Spitzer;
 AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letter to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. We also received a copy of the June 18, 2002 response to your letter by Qwest Corporation ("Qwest's Letter"). Although Qwest entered into unfiled agreements with several Competitive Local Exchange Carriers ("CLECs"),¹ Qwest discusses the Eschelon agreements specifically in its letter, indicating that it is using these agreements as an illustration. While Eschelon could agree to some of the statements in Qwest's Letter, Eschelon has a different perspective as to the events. Eschelon believes that, now that Qwest has submitted its letter, Eschelon should state its position for the Commission.

Qwest's conduct with respect to Eschelon, McLeod, Covad, or the other small CLECs with which Qwest had agreements needs to be reviewed in context. In the fall of 2000, Qwest's then Chairman and Chief Executive Officer, Joseph Nacchio, publicly announced an agreement with McLeod, which he characterized as a significant positive development. He stood before the Regional Oversight Committee ("ROC") and told members that Qwest was going to go behind closed doors and work out differences with CLECs, rather than litigate them. Representatives of Qwest repeatedly said they wanted to work on a "business-to-business" basis with Eschelon, rather than litigate issues. They also continually attempted to distinguish Qwest from the former company, US West.²

¹See Staff Report and Recommendation, *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, AZ Docket No. RT-00000F-02-0271 (June 2, 2002); see also Amended Verified Complaint, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (March 19, 2002). The "small CLECs" identified in the Minnesota Complaint include the following 10 CLECs: HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, Onvoy Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, VAL-ED Joint Venture, and WETEC. See *id.* ¶ 196.

²See also "After Joseph P. Nacchio, Qwest Communications International Inc.'s brash, Brooklyn-born chief executive, won the battle for US West in 1999, he wasted no time deriding the sleepy regional Bell.

Commissioner Marc Spitzer

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Qwest asked for time to make the transition to become a more CLEC-friendly wholesale business. Qwest made these types of statements to others as well.³ As the Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") shows, Eschelon's management wanted to believe in the promise of a better relationship under new management and attempted to use the non-litigious path touted by Qwest.⁴

Some members of Eschelon's management have worked for incumbent local exchange carriers ("ILECs") themselves. They have also been through changes in ownership and management and know that the related transitions can take time. Eschelon's management was open to working with Qwest and, if it really worked, to saying so publicly and perhaps even at some point supporting Qwest's 271 bid.⁵ Although it could be inferred from Qwest's Letter that it worked, it didn't work.

Despite the suggestion in Qwest's Letter to the contrary, the 271 provision in the Escalation Letter was a condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. Qwest would not agree to develop a plan to address pressing service quality and other problems unless Eschelon dropped its opposition to Qwest's 271 bid. Whereas Qwest's Letter reads as though all service problems were solved *before* Eschelon dropped out of the 271 proceedings, Qwest required Eschelon to *first* drop out of the proceedings. Eschelon thus takes issue with the following statement in Qwest's Letter: "Eschelon's agreement to not oppose Qwest's Section 271 application was . . . expressly contingent upon the parties' ability to agree upon *and implement* a plan that satisfied Eschelon." Qwest's Letter, p. 2 (emphasis in original). The Escalation Letter included only an *agreement to agree* to a plan to implement service quality solutions. It did *not* condition Eschelon's agreement to not oppose Qwest's Section 271 application upon the parties' ability to *implement* a plan,

In senior management meetings, he described the company as 'U S Worst' and publicly likened the company's workers to 'clowns.' He surrounded himself with colleagues from his high-flying upstart, and cut U S West executives out of the loop. When Qwest moved into U S West's dated-looking headquarters here, Mr. Nacchio installed a sign on the 52nd floor that read: 'Excuse our appearance. We're entrepreneurs. This building was built in a different era and we save cash by not remodeling.'" Solomon, Deborah, "Bad Connection: How Qwest's Merger With a Baby Bell Left Both in Trouble --- Brash Mr. Nacchio Derided U S West After Buying It; Now, It's His Safety Net --- SEC Probes the Accounting," *The Wall Street Journal* (via Dow Jones), p. A1 (April 2002).

³ See, e.g., *id.*

⁴ Generally, public policy favors settling disputes. See, e.g., Minn. Stat. § 237.011 ("Telecommunications goals"; "encouraging voluntary resolution of issues between and among competing providers and discouraging litigation."). In the 271 dockets, Eschelon refrained from litigation while attempting to resolve disputes, including quality of service problems. Eschelon's conduct was legitimate behavior, particularly because Eschelon was not obligated to participate in the 271 proceedings. It is a separate question as to whether any other rule or policy required Qwest to disclose the known problems raised by Eschelon in discovery, pursuant to the burden of proof, or otherwise in the 271 proceedings.

⁵ In fact, when Eschelon experienced improvement in Qwest's performance, Eschelon acknowledged that improvement, even in some cases when the performance still had a ways to go. Eschelon's management hoped that positive reinforcement would encourage progress, and Qwest made it known that it was more willing to negotiate if CLECs made such statements.

EXHIBIT G

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as represented in Qwest's Letter. Although Qwest's Letter cites the April 30, 2001, deadline for agreeing to an implementation plan, that deadline was extended more than once. An implementation plan was not agreed upon until July of 2001. The July agreements had to be implemented after that date. From November 15, 2000 through July of 2001 (and afterward), however, Qwest required that Eschelon not participate in 271 proceedings as a condition of continuing negotiations as to the plan and implementation of the plan and later agreements.

Nonetheless, the premise of Qwest's Letter, with respect to Eschelon, appears to be that Eschelon did not participate in 271 proceedings because Eschelon's problems were solved. Qwest's Letter particularly creates this impression for a reader unfamiliar with the underlying facts. But, this is not the case. The problems were not all solved. Qwest points to Eschelon's letter of November 3, 2000, to the Commission to suggest that, if any⁶ problems continued to exist, Eschelon would have continued to raise them in the 271 proceeding. As Qwest knows, however, the later November 15, 2000, Escalation Letter required Eschelon's silence.⁷ Despite Eschelon's arguments to the contrary, Qwest interpreted that agreement more broadly than not opposing Qwest and said that it required Eschelon not to participate in the 271/SGAT proceedings.⁸

⁶ The November 3, 2000, letter related primarily to cutover issues. Most of the problems raised by Eschelon in the Arizona 271 proceeding related to UNE-P. See Eschelon's Comments Addressing UNE Combinations, *In re. U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Arizona Docket No. T-00000A-97-0238 (Sept. 21, 2000) ("Arizona UNE-P Comments"); see also Verification of Garth Morrisette (same).

⁷ Qwest states that none of the five merger-related agreements in issue contained agreements to refrain from participation in 271 proceedings. See Qwest's Letter, p. 1. Qwest also states that only two agreements of those referred to by Commissioner Spitzer mentioned 271 proceedings. *Id.* If they do not imply that there were no other agreements relating to 271 participation, these statements at least leave the issue unanswered for the Commissioner. According to a news report, McLeod had an agreement not to oppose Qwest in 271 proceedings, but it was an oral agreement. See "States Probe Qwest's Secret Deals To Expand Long-Distance Service," *Wall Street Journal*, p. A10 (April 20, 2002) ("As part of that deal, McLeod agreed to stop its opposition to the Qwest-U S West merger. The company also had a verbal agreement to not oppose Qwest's entry into long-distance, McLeod officials told regulators, a contention that Qwest does not dispute.") Qwest does not state whether there were any others.

⁸ Qwest particularly objected to Eschelon raising publicly any problems with commercial performance. Eschelon argued that it could participate in SGAT proceedings to gain input into the wording of the SGAT without submitting evidence of problems with commercial performance. Eschelon believed that an opportunity to influence the language of the SGAT would have been important and valuable, because Eschelon has a different business plan from other CLECs involved in that process and could have tried to ensure that its issues were addressed. Qwest also uses the SGAT as a negotiation template, and participation in the SGAT proceedings would have allowed Eschelon to gain a better understanding of that template. But, Qwest took the opposite position and claimed that Eschelon's participation would breach the Escalation Letter. In fact, on the one occasion when Eschelon's representative later attended a multi-state 271/SGAT workshop in Denver, Qwest's attorney Charles Steese told her that she should not be there. Qwest's representatives also called Eschelon's top management to complain and made Eschelon "explain" its conduct. Afterward, Eschelon no longer participated in the 271 proceedings, as required by Qwest.

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Because Qwest required confidentiality and did not disclose the Escalation Letter,⁹ Qwest was able to create the impression that problems with Qwest's commercial performance were solved when all of them were not. Qwest bears the ultimate burden of proof as to its commercial performance on all checklist items, however, even if "no party files comments challenging compliance with a particular requirement." FCC BANY Order, ¶ 47.¹⁰

Eschelon entered into the plan and related agreements with the expectation that, if an agreement were reached as to service quality issues, Qwest would abide by the agreement. Although Qwest represents in Qwest's Letter that the 271 provision was . . . contingent upon the parties' ability to agree upon and implement a plan "*that satisfied Eschelon*,"¹¹ Qwest still has not implemented a plan to address Eschelon's quality issues to Eschelon's satisfaction. *See, e.g.,* Affidavit of Lynne Powers (June 7, 2002) (copy enclosed).¹² Eschelon had many service problems, access and billing problems, and other issues with Qwest's commercial performance throughout the course of the Arizona 271 proceeding. Qwest was aware of these problems, through many discussions with Eschelon, as well as through monthly Report Cards provided by Eschelon to Qwest during that time. Eschelon could not raise these issues to the ACC, however, because Qwest continued to hold Eschelon to the requirement that Eschelon not oppose Qwest in 271 proceedings.¹³ Therefore, the following statement in Qwest's Letter is also inaccurate: "if it did not [work], Eschelon was free to say so, to the ACC or to anyone else." Although Eschelon was dissatisfied in several respects, pursuant to the November

⁹ Regarding Qwest's obligation to file agreements, Eschelon agrees with the following quotation by Anthony Mendoza, the Minnesota Department of Commerce deputy commissioner for telecommunications: "[Qwest] is the only company that is required to disclose them to the PUC." *See* "Companies didn't clear deals with PUC, regulators say," Steve Alexander, *Minneapolis Star Tribune*, Feb 15, 2002, p. D2. The federal Act places the burden on Qwest to make terms of interconnection, if any, available to other CLECs, and therefore it is Qwest's responsibility to make that determination and file any such agreements pursuant to the Act. Placement of the burden on Qwest makes sense, because Qwest has superior access to information relevant to whether a term or condition is of the type for which filing is required. (For example, while a CLEC may believe that a term is in settlement of an individual dispute, Qwest is in a position to know whether the dispute is truly unique or the experience is shared by other CLECs and whether the same or similar solution is suitable for, and should be made available to, other CLECs.) Eschelon is not aware of anything in the agreements that prevented Qwest from filing them. Qwest could have requested written consent for disclosure from CLECs at any time, if Qwest claims it was concerned about the confidentiality provisions that Qwest required as part of agreements.

¹⁰ *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. December 22, 1999) ["FCC BANY Order"].

¹¹ *See* Qwest's Letter, p. 2 (emphasis added).

¹² Not only were Eschelon's substantive issues not fully addressed, but also Qwest did not even adhere to the terms of the Escalation Letter itself. The letter identified Qwest's then CEO Mr. Nacchio by name and required Mr. Nacchio to meet with Eschelon, but Mr. Nacchio refused to do so.

¹³ For example, the enclosed email, dated May 25, 2001, from Eschelon to Andrew Crain, Charles Steese, and Jim Gallegos of Qwest confirms that Eschelon was not responding to Qwest discovery in the Arizona 271 proceeding, because Eschelon was "not participating in the [Arizona 271] proceeding at Qwest's request."

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15, 2000, Escalation Letter, Eschelon was not "free to say so, to the ACC or to anyone else."

In Qwest's Letter, Qwest also points out that Eschelon participated in the Change Management Process ("CMP") (including Re-design) while the 271 proceeding was pending. The CMP is separate from the 271 proceedings, and issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. Any issues that were did not have the benefit of explanation by Eschelon, which had first-hand experience with the problems. Eschelon would have participated more fully in CMP, if Qwest had not exerted pressure on Eschelon not to do so. Eschelon argued that CMP was not a 271 proceeding and therefore the Escalation Letter did not prohibit participation in CMP.¹⁴ Qwest took the opposite position and actively enforced it. Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon's President personally attended CMP monthly and Re-Design meetings to determine whether Qwest's attacks on Eschelon representatives were fair and whether Qwest's representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon's President concluded that Qwest's statements were not fair or accurate and the Eschelon's CMP participation was appropriate and necessary to resolve critical business issues. Eschelon's President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon's perspective. Mr. Martin did not do so. Although Eschelon ultimately maintained some level of participation in CMP, it is difficult and frustrating, in light of the actual events, to read that Qwest is now holding out Eschelon's participation in CMP as evidence of alleged full and uninhibited participation in CMP.

Qwest also states in its letter that: "The purpose of the settlements was not to suppress complaints but rather to *resolve* them." Qwest's Letter, p. 1 (emphasis in original). However, in addition to Qwest's position with respect to CMP and 271/SGAT meetings, on October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process" relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved

¹⁴ In this general time frame, Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. When doing so, Qwest was well aware of market conditions and the resulting additional pressure that would be placed on Eschelon from stopping the payments and knew that doing so gave Qwest greater leverage over Eschelon. Eschelon does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped.

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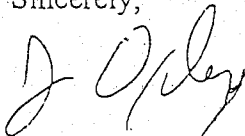
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without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals. Because Qwest has made representations regarding its purpose in proposing settlements, the Commission should have these facts when making that determination.

The telecommunications market is experiencing critical challenges. As a start-up, smaller company, Eschelon is particularly affected by these challenges. Resources are tight, and Eschelon's energy needs to be devoted to meeting the business challenges that it faces daily. Eschelon is also aware that it has settled some of its own claims with Qwest and that it may be viewed as late in speaking out. In light of all of this, Eschelon hesitated to send this letter. Because of Qwest's specific discussion of its dealings with Eschelon in Qwest's Letter, however, Eschelon decided it should share its different perspective.

Sincerely,



J. Jeffery Oxley

Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell
Commissioner Jim Irvin
Timothy Berg, Qwest
Todd L. Lundy, Qwest
Richard Corbetta, Qwest
Docket Control (original plus 20 copies)
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July 10, 2002

AZ CORP COMMISSION
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Commissioner Marc Spitzer
 Commissioner Jim Irvin
 Arizona Corporation Commission
 1200 West Washington
 Phoenix, Arizona 85007-2996

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JUL 11 2002

LEGAL DIV.
ARIZ. CORPORATION COMMISSION

Re: AZ Docket Nos. RT-00000F-02-0271, T-00000A-97-0238

Dear Commissioner Spitzer and Commissioner Irvin:

Eschelon Telecom, Inc. ("Eschelon") received a copy of your letters to the Parties in Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Commissioner Spitzer asked the parties to address the differences in the letters submitted by Qwest and Eschelon. Therefore, Eschelon submits this Reply to Qwest's letter to the Commission of June 27, 2002 ("Qwest's June 27 Letter") and the Response of Qwest Corporation to Staff's Request for Comment dated June 27, 2002 ("Qwest's Comments"). Because Qwest criticized Eschelon's previous letter as "unverified rhetoric" (*see* Qwest's June 27 Letter, p. 1), Eschelon attaches exhibits to further support the information provided.

Change Management Process

The Change Management Process ("CMP") is a primary example of an area in which the information provided by Eschelon and Qwest varies greatly. Eschelon has participated in the CMP (formerly "CICMP") for about as long as any Competitive Local Exchange Carrier ("CLEC"). Although Qwest's June 27 Letter and Qwest's Comments characterize CMP as though it were an arm of the 271 process, that is not the case. Eschelon's participation in CMP was not some effort to involve itself in the 271 proceedings. Quite the reverse is true. Long after Eschelon's initial participation in CMP, some 271 issues were interjected into the CMP Re-design process when Qwest referred issues from the 271 workshops to the CMP Re-design team. Although some 271 issues were discussed, participation in CMP is far from being the same as participation in 271. Issues raised in monthly CMP meetings were not necessarily brought to the 271 proceedings. These include commercial performance issues. Even if another party mentioned some of these issues in 271 proceedings, the participants in those proceedings did not have the benefit of explanation by Eschelon, which had first-hand commercial experience with the problems.

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Because CMP is an important issue about which Qwest's filings vary greatly from Eschelon's information, Eschelon will provide additional information from which the Commission may decide which party more accurately and fairly captured the course of events.¹ About CMP, Eschelon said:

Qwest had Eschelon representatives pulled from CMP Re-Design meetings, reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report, required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs, and took other steps to inhibit Eschelon's participation in CMP/CMP Re-Design and prevent information from becoming known. Finally, Eschelon's President personally attended CMP monthly and Re-Design meetings to determine whether Qwest's attacks on Eschelon representatives were fair and whether Qwest's representations that CMP issues could be resolved just as well outside of CMP were accurate. Eschelon's President concluded that Qwest's statements were not fair or accurate and the Eschelon's CMP participation was appropriate and necessary to resolve critical business issues. Eschelon's President encouraged Gordon Martin of Qwest to also attend the CMP meetings to gain an understanding of that process and Eschelon's perspective. Mr. Martin did not do so.

See Eschelon's Letter to Commissioner Spitzer, p. 5 (June 24, 2002) ("Eschelon's June 24 Letter"). Qwest did not address Eschelon's first statement from the above quotation about CMP (that Qwest had Eschelon representatives pulled from CMP Re-Design meetings) in Qwest's June 27 Letter or Qwest's Comments. Therefore, Eschelon will respond to the issues Qwest did address first and then return to this issue.

Comments on CMP Status Report

Eschelon's second statement about CMP was that Qwest "reviewed but did not disclose written comments by Eschelon on a Qwest status report that were critical of that report." Eschelon's June 24 Letter, p. 5. In response to this statement, Qwest said: "In fact, Eschelon *only* submitted specific comments regarding Qwest's monthly CMP re-design status reports *on a single occasion*." Qwest's June 27 Letter, p. 2. (emphasis added). Enclosed, however, are copies of specific comments regarding Qwest's monthly CMP re-design status submitted by Eschelon to Qwest on *two* occasions. See Exhibits 2 - 3.² As Eschelon indicated in Eschelon's June 24 Letter, Eschelon's October 2001 comments are critical of Qwest's status report. See Exhibit 2. Eschelon submitted a copy of Exhibit 2 to Greg Casey, Audrey McKenney, and Dana Filip of Qwest on Friday,

¹ See Exhibit 1 (Verification of F. Lynne Powers).

² Qwest states that it attached a copy of Eschelon's redlined version of the status report as an exhibit to the report. See Qwest's June 27 Letter, p. 2. Qwest attached Eschelon's comments with respect to Exhibit 3 (see Exhibit 4), but not Exhibit 2. Qwest also refers to a "high level" email submitted by Eschelon. See Qwest's June 27 Letter, p. 2. A copy of that separate email is attached as Exhibit 5.

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October 5, 2001 and to Andrew Crain on October 9, 2001. *See Exhibit 2* (cover email to Mr. Crain). Ms. Filip is Qwest's Senior Vice President of Global Service Delivery, and Mr. Crain is a Qwest attorney. Both Ms. Filip and Mr. Crain are Core Team Members of the CMP Re-design Team. *See Exhibit 6*.

After Eschelon submitted its October 2001 comments on Qwest's CMP status report to Qwest, Mr. Crain reportedly mentioned the comments to WorldCom's attorney Thomas Dixon. Mr. Dixon is an active member of the CMP Re-design Team and active participant in the 271 proceedings in several states, including Arizona. Mr. Dixon asked Mr. Crain for a copy of Eschelon's comments. Mr. Crain responded that he was "mixed up." *See Exhibit 7*. Although Mr. Crain had Eschelon's comments in his possession at the time, as shown by Exhibit 2, Mr. Crain told Mr. Dixon that Eschelon had not "sent anything." *See Exhibit 7*. Despite these facts, Qwest represents to the Commission that "Qwest in no way attempted to limit the distribution or use of Eschelon's comments." Qwest's June 27 Letter, p. 3.

With respect to the October 2001 comments, Eschelon management agreed to provide them directly to Qwest management, instead of submitting them by email to the entire CMP Re-design Team. Eschelon did so for two reasons: (1) to show a spirit of cooperation because Qwest had indicated that it would resolve pressing disputes with Eschelon (which it later did not do); and (2) to respond to attacks by Ms. Filip and Ms. McKenney on Eschelon's participation in the CMP Re-design process made with the purpose of decreasing that participation. *See Exhibit 8; see also* discussion below. In these situations, Ms. McKenney sometimes characterized Eschelon as a "bad" business partner. Given Qwest's monopoly supplier position, Eschelon did not need to be expressly reminded that Qwest had the ability to punish conduct it deemed to be "bad."

Withdrawal of Change Request Relating to Qwest Anti-Competitive Conduct

Eschelon's third statement about CMP was that Qwest "required Eschelon to withdraw a Change Request relating to anti-competitive behavior before it was distributed to other CLECs." Eschelon's June 24 Letter, p. 5. In September of 2001, CLECs participated in a call to discuss CMP issues. One of the issues discussed was whether a Change Request would be the appropriate vehicle to raise with Qwest the topic of anti-competitive conduct. Allegiance Telecom ("Allegiance") said that it had recently experienced instances when it believed Qwest personnel gave false information to Allegiance's customers (such as that the customers' service would go down if they proceeded to converting with Allegiance). Eschelon said it had recently had a similar experience. They agreed that a Change Request would be an appropriate avenue for addressing these issues.

On or about September 25, 2001, Allegiance submitted its initial Change Request relating to this issue. *See Exhibit 9*. Allegiance asked Qwest to establish an improved process for reporting occurrences of anti-competitive behavior, including a single point of

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contact, a thorough investigation, an appropriate and timely response to CLECs, and proper training of Qwest personnel to prevent future occurrences. *See id.* Qwest assigned the Change Request number PCC092701-3. *See id.* The initial Change Request contained the name and badge number for the Qwest technician alleged to have made inappropriate statements. Eschelon copied the description of the Change Request, containing this information from Qwest's web page. *See id.* Shortly afterward, Eschelon could not find the Change Request on the web page. Today, a slightly modified version of the Change Request (without the technician-identifying information) is posted on the web page with the archived Change Requests, and it has a "Withdrawn" status. *See Exhibit 10.* Allegiance has indicated that Qwest met with Allegiance in October of 2001 and that Qwest, including Ms. McKenney, asked Allegiance to withdraw the Change Request. Qwest's written Status History for the Change Request (posted on the Qwest web page), however, does not document the meeting between Allegiance and Qwest or the fact that Qwest asked Allegiance to withdraw the Change Request. *See Exhibit 10.*³

On September 28, 2001, Eschelon also submitted a Change Request relating to this issue to the Qwest CMP. *See Exhibit 11.* Eschelon described a situation in which a Qwest representative told a customer switching to Eschelon that Eschelon was filing for bankruptcy, which was not a true statement. *See id.* Eschelon asked Qwest to develop a written process to help prevent similar situations in the future. *See id.* Eschelon asked Qwest to include in the process steps for training Qwest employees, reporting the conduct, responding to such situations, and communicating to CLECs on the action taken. *See id.* As in the case of the Allegiance Change Request, Eschelon was seeking a process solution and was not simply reporting an isolated incident.⁴ Qwest is required to provide a Change Request number to the requesting CLEC and log that number into its database within two days after receiving a completed CR. *See CMP Document at § 5.3.*⁵ Qwest did not do so and said, on October 10, 2001, that it had not provided a number because it was "clarifying this issue internally." *See Exhibit 12.* The documented CMP process does not provide for such a step. Qwest (Ms. McKenney and Ms. Filip) asked Eschelon to withdraw the Change Request from CMP, indicating Qwest did not believe

³ When Eschelon later raised an issue relating to the handling of these Change Requests with the CMP Re-design team, Qwest criticized Eschelon for using technician-identifying information in its Change Request and stated that this was one of the reasons that Qwest asked Eschelon to withdraw the Change Request. Eschelon pointed out that this was not the reason given to Eschelon at the time and that Eschelon's Change Request did not contain technician-identifying information. Qwest confused the Change Requests submitted by Allegiance and Eschelon. Eschelon did distribute the Allegiance Change Request to the Core Re-design Team at the later date, but the information provided was taken from Qwest's published web page.

⁴ Eschelon remains dissatisfied with Qwest's approach to these issues. Since then, Eschelon has reported to Qwest additional instances of inappropriate comments by Qwest representatives to Eschelon customers. Afterward, Qwest provides, at most, a vague statement that Qwest investigated and will take appropriate steps. Eschelon does not know what steps were taken either in the particular case or to avoid additional instances in the future. If Qwest had accepted the Change Requests of Eschelon and Allegiance, perhaps a better process would be in place by now.

⁵ *See* <http://www.qwest.com/wholesale/cmp/re-design.html>.

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that circulating such examples to other CLECs was consistent with the requirement not to oppose Qwest in 271. Eschelon withdrew the Change Request.

Qwest admits that it asked Eschelon to withdraw the Change Request. *See* Qwest's June 27 Letter, p. 3. Qwest claims that its only reason for doing so was that the "issue related to employee performance, rather than a systemic process issue." *Id.* In that case, according to the governing CMP Document and consistent with the handling of other Change Requests at the time, Qwest should have assigned the Change Request a number, posted the Change Request on its wholesale web page, stated in a written response its position that the issue related to employee performance, posted that response (and its request to withdraw) as part of the Status History, and given the Change Request a published status of "Withdrawn." Qwest followed none of these documented procedures.

Moreover, in both the Eschelon and the Allegiance situations, Ms. McKenney was involved in asking a CLEC to withdraw a Change Request. Ms. McKenney is Senior Vice President of Wholesale Business Development at Qwest. Ms. McKenney is not a member of the CMP team or the service management team. Ms. McKenney handled the bulk of the negotiations of unfiled agreements with Eschelon. The reason given by Qwest for its request to withdraw the Change Request does not explain Ms. McKenney's involvement.

Other Qwest Steps to Inhibit Eschelon's CMP Participation

Eschelon's fourth statement about CMP was that Qwest "took other steps to inhibit Eschelon's participation in CMP/CMP Re-design and prevent information from becoming known." Eschelon's June 24 Letter, p. 5. Qwest claims that Eschelon's participation in CMP was "full" and "never restricted." *See* Qwest's June 27 Letter, p. 3 & Qwest's Comments, p. 7. In April and June of 2001, however, Ms. McKenney of Qwest was calling Eschelon's President to complain that Eschelon should not be participating in Qwest's CMP meetings. Eschelon attempted to reason with Qwest by explaining Eschelon's business need for participating in CMP and describing the competitive disadvantage to Eschelon if prevented from participating in CMP. *See, e.g.,* Exhibit 13. A comparison of Exhibit 13 with Qwest's June 27 Letter and Qwest's Comments raises the question of why Eschelon had to make these arguments at all, if Eschelon's participation in CMP was as free and uninhibited as suggested by Qwest. Note that Ms. McKenney did not write back to Eschelon and say that there has been some misunderstanding and, of course, Eschelon could participate freely in CMP. That was not Qwest's position.

Qwest's efforts to inhibit Eschelon's CMP participation also extended to CMP Re-design meetings. In October of 2001, for example, Ms. Filip specifically asked Eschelon to refrain from participating in a CMP Re-design Team discussion of the interim process for the Qwest Product Catalog ("PCAT"). *See* Exhibit 8. Despite

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Eschelon's strong objections to the PCAT process, Eschelon believed it did so, as Qwest requested. *See id.* Nonetheless, Ms. Filip called Eschelon immediately after that session to complain that Lynne Powers of Eschelon had provided some comments when she should have been silent. The effects of Eschelon's silence on this particular occasion far outlasted the particular meeting. Qwest made many changes to the PCAT with either no notice to CLECs of the particular change or at least no red-lining accompanying a notice to show the nature of the change. By the time Eschelon was able to participate on this issue again, Qwest argued that it was too late to go back and provide information to CLECs on the changes made earlier. Therefore, Eschelon and other CLECs never received red-lined documents showing what had changed for many changes to the PCAT.

Ms. Filip and Ms. McKenney generally took the position that the Escalation Letter barring Eschelon from participating in 271 proceedings⁶ also entailed that Eschelon should either be silent or support Qwest's position on other issues in the CMP monthly and Re-design processes. Qwest said that Eschelon had an obligation to deal directly with Qwest executives instead of raising issues in the CMP arena. Eschelon did not believe, however, that Qwest could separately address the types of issues Eschelon raised in those proceedings without affecting other CLECs and that consequently a bilateral approach would be futile. Eschelon provided Qwest management with a summary of Eschelon's pending and recently closed Change Requests to attempt to show the detailed nature of the issues, many of which affected other CLECs, to convince Qwest of Eschelon's legitimate business need to raise in the context of CMP. *See* Exhibit 8. Again, if Qwest was not opposing Eschelon's participation in CMP, the question is raised as to why Eschelon needed to expend resources creating such summaries and trying to persuade Qwest of the need for Eschelon's participation. Qwest verbally opposed Eschelon's arguments. On October 16, 2001, Ms. Filip told me and Eschelon's President on a conference call that Qwest expected Eschelon to not only withdraw the Change Request discussed above but also limit Eschelon's participation in other ways. For example, Ms. Filip asked Eschelon to reduce the number of communications to other CLECs and the testers⁷ concerning Qwest's failings (such as by not copying emails to other members of the CMP Re-design Team) and discuss performance issues off line rather than in meetings attended by others.

The arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months. Although Qwest appears to praise Eschelon's participation in the CMP process in its letters to the Commission, Qwest does

⁶ *See* Escalations and Business Solutions Letter signed by Qwest and Eschelon (Nov. 15, 2000) ("Escalation Letter") (copy attached as Exhibit 14).

⁷ For example, on April 3, 2001, Qwest's attorney Laurie Korneffel told Eschelon that Qwest was "comfortable" that Eschelon's participation in a KPMG question/answer proposal would not violate the agreement not to oppose Qwest in 271, but she said that Qwest "would not be in favor of Eschelon serving as a 'test' CLEC." *See* Exhibit 15. Eschelon had to inquire of Qwest as to the boundaries of the limitations on Eschelon's participation, because it had become clear that Qwest interpreted the 271 limitation more broadly than Eschelon.

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not disclose that verbally it took a very different stance in its ongoing discussions with Eschelon at the time. Ms. Filip and Ms. McKenney represented that Eschelon's representatives were causing "havoc" in the CMP monthly and Re-design meetings. *See id.* On January 12, 2002, Eschelon's President summarized Qwest's attempts to decrease Eschelon's CMP participation over the last year as a "constant irritant" to the business relationship. *See Exhibit 16.*

In an attempt to put the issue to rest and prove Eschelon's position, as indicated in Eschelon's June 24 Letter (p. 5), Eschelon's President asked Qwest's Executive Vice President of Global Wholesale Markets Gordon Martin to attend the CMP and Re-design sessions, as Eschelon's President had done. *See id.* Along with Ms. McKenney, Mr. Martin was intimately involved in the negotiations with Eschelon, including negotiation of proposed terms that would limit Eschelon's participation in CMP.⁸ Eschelon's President told Mr. Martin that CMP attendance "is the only way that you can determine what goes on as both sides have different views as to what happens at these sessions." *See id.* Exhibit 16 clearly shows that Eschelon's request for Mr. Martin's attendance was made in the context of resolving the issue of Qwest's persistent requests to limit Eschelon's CMP participation. Nonetheless, Qwest's Letter reads as though Eschelon made an unrelated and unprecedented request for upper management to attend CMP meetings. *See Qwest's June 27 Letter, p. 3.* Qwest then represents to the Commission that there "was nothing wrong with Qwest's selecting its representatives who had knowledge about the detail at issue at CMP meetings." *Id.* Eschelon agrees that knowledgeable Qwest employees should attend CMP meetings. This is not, however, the issue that the Commission seeks to investigate and upon which Eschelon commented. The relevant issues are the reason for Eschelon's request that Mr. Martin participate in some CMP meetings and Mr. Martin's (and Ms. McKenney's) conduct in pressing Qwest's efforts to decrease Eschelon's CMP participation without personally observing the Eschelon behavior that Qwest employees characterized as causing "havoc."

Excluding Eschelon From CMP Meetings

As mentioned above, Qwest did not address Eschelon's first statement about CMP in its June 24 Letter -- that Qwest "had Eschelon representatives pulled from CMP Re-Design meetings" -- in Qwest's June 27, 2002 Letter or Qwest's Response. It does not do so, even though Qwest directly responded to Eschelon's statements about Qwest's not disclosing comments on a status report and asking Eschelon to withdraw a Change

⁸ Eschelon took the position that, if Qwest was going to impose limitations on Eschelon's CMP participation, Qwest needed to be clear in its expectations, so that Eschelon would not continue to be criticized by Qwest after the fact for alleged infractions. At a meeting on January 8, 2002, Ms. Filip agreed to provide clear, written expectations to Eschelon by January 11, 2001. On January 11, 2002, Mr. Martin said that Qwest's legal department advised not to provide a written list. He said that, instead, Ms. Filip would call Eschelon to verbalize a list and then there would be some documentation of agreed upon issues. Ms. Filip did not provide a verbal list or later documentation after that date. The parties did not agree on this issue.

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Request. Eschelon believes a reasonable conclusion to draw from Qwest's silence on the specifics of this point is that Qwest admits that it pulled Eschelon representatives from CMP Re-design meetings. Qwest broadly states, however, that Eschelon's participation in CMP Re-design was "never restricted," Qwest's Comments, p. 7, so this assertion needs to be addressed.

Qwest excluded Eschelon from virtually all of the Qwest CMP Re-design meetings that took place on October 30, 2001 through November 1, 2001. Lynne Powers of Eschelon planned to participate in those sessions by telephone, and Karen Clauson of Eschelon flew to Denver at Eschelon's expense with the plan of staying through the November 1st meeting. *See* Exhibit 17. As indicated on Qwest's Attendance Record for that meeting, however, Eschelon did not participate on either October 31 or November 1, 2001. *See* Exhibit 18 at Attachment 1. The minutes of the meeting show that both Ms. Powers and Ms. Clauson participated in the meeting on the morning of October 30. *See id.* During this portion of the meeting, the parties were reviewing the agenda and indicating topics that they would like to cover. Eschelon listed several topics. *See id.* After Eschelon started to do so, Ms. Filip left the meeting and participated in a conference call with William Markert, Robert Pickens, and myself of Eschelon.

During the call on October 30, 2001, Ms. Filip threatened that, if Ms. Powers and Ms. Clauson did not stop participating in the meeting immediately, Ms. Filip would *devote all of her energies* to making Eschelon miserable. Specifically, Ms. Filip said, in an angry manner, that she would devote all of her energies to ensuring that Ms. McKenney succeeded in her objectives. I personally heard her make this statement. *See also* Exhibits 19 - 20 (Verification Affidavits of Mr. Markert and Mr. Pickens).⁹ This told Eschelon two things: (1) that Ms. McKenney's objectives were adversarial to those of Eschelon, even though Ms. McKenney represented that she is attempting to further her customer's interests through a "business-to-business" relationship; and (2) that Ms. Filip would use her position to intentionally harm Eschelon's business. Ms. Filip, as Qwest's Senior Vice President for Global Service Delivery, holds Eschelon's lines in her hands. Given the real harm that someone in Ms. Filip's position could do to a business such as Eschelon's, Eschelon had no choice but to capitulate. Ms. Powers dropped off the call. Ms. Powers joined the conference bridge to ask Ms. Clauson to leave the meeting to take a call from her in the hallway. Afterward, as a result, Ms. Clauson had to check out of

⁹ Because Qwest made these statements verbally and not in writing, it has the advantage of saying that Eschelon cannot provide written evidence of Qwest's own statements. In addition to affidavits from Eschelon's participants in the conversation, the Commission has the outside evidence showing that Eschelon intended to participate fully in the meetings but then left abruptly. *See, e.g.,* Exhibit 17. When viewed in the context of all of the other Exhibits provided with this Reply, that conduct is consistent with the evidence that Qwest was attempting to limit Eschelon's participation in CMP. Similarly, Eschelon's statements in its February 8, 2002 letter (discussed in Qwest's Comments, p. 8) should be read in the context of all of the Exhibits to this Reply and, in particular, Exhibit 21. Given Qwest's heavy reliance on oral communications (even including at least one oral agreement with a competitor, *see* Qwest's Comments, at 8), the Exhibits are as much or more written documentation as can be expected to dispute the claims in Qwest's June 27 Letter and Qwest's Comments.

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her hotel early and return to Minneapolis. See Exhibit 17. Eschelon had raised issues that it believed needed prompt discussion, but Eschelon did not participate in the remainder of the meeting on October 30, or the meetings on October 31 and November 1. Despite Qwest's statements to the contrary, being excluded from meetings restricts participation in the process and prevents a party from raising issues at those meetings. Cf. Qwest's Comments, p. 7 ("never restricted") & Qwest's June 27 Letter, p. 3 ("No re-design participant, including Eschelon, has ever been prevented from raising any issue during that process.").

Timing of Qwest's Ending Specific Payments to Eschelon

As indicated, the arguments with Qwest about the "allowable" level of Eschelon's participation in CMP and CMP Re-design continued for months, over which time Eschelon became more resolved that it needed to participate in the meetings. In other words, over this period of time, it became clear to Qwest that Eschelon was not going to remain silent or just do as it was told. As Eschelon pointed out in its June 24 Letter (p. 5, note 14), during the same general time frame¹⁰ when Qwest was having this realization, *Qwest stopped making payments to Eschelon, despite written contractual obligations to pay Eschelon. Although Qwest is well aware of the facts, Qwest complains in its June 27 Letter (p. 4) that Eschelon's statements are "vague and non-specific." To address that complaint, Eschelon will be clear about the payments that Qwest stopped, the timing, and the effect on Eschelon.

The Consulting Fee Agreement (§ 3) required Qwest to pay Eschelon "an amount that is ten percent (10%) of the aggregate billed charges for all purchases made by Eschelon from Qwest November 15, 2000 through December 31, 2005."¹¹ A later agreement provided that Qwest would pay this amount to Eschelon on a quarterly basis. This is a written contractual obligation that Qwest has defended as a legitimate settlement agreement. Qwest is not claiming that Eschelon breached this provision. To the contrary, Qwest recently submitted sworn testimony indicating that Qwest now places a "very high value" on the consulting services of Eschelon.¹² Given that according to Qwest's own account Eschelon was in compliance with the written contract, no legitimate basis existed for Qwest to stop payment under that agreement. Qwest stopped paying Eschelon pursuant to this provision, however, after August of 2001. In the

¹⁰ Eschelon uses the term "general" time frame because Qwest payments may be late or may not be due for a set period of time. Therefore, the exact date on which Qwest stopped payments can be difficult to pinpoint.

¹¹ See Confidential Amendment to Confidential/Trade Secret Stipulation (Nov. 15, 2000) ["Consulting Fee Agreement"], at § 3; provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271.

¹² See Qwest Corporation's Written Direct Testimony of Judith Rixe, p. 9, line 15, *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket No. P-421/C-02-197 (April 22, 2002) ["Rixe Testimony"].

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absence of a breach, one looks for other factors to explain Qwest's refusal to honor its contractual commitment while Eschelon was providing services of "high value."

Qwest claimed that it was withholding payment because Eschelon had complained that switched access minutes were missing and that Qwest had not delivered on its promise to negotiate pricing adjustments, and negotiations were continuing as to these and other issues. Those issues, however, were separate from the undisputed consulting fee. Qwest could have continued to honor its written obligation to pay the consulting fee, as it was required to do by the contract, while disputed issues were negotiated. Instead, Qwest made it a condition of resolution of Eschelon's legitimate access, service quality, and pricing complaints that the Consulting Fee Agreement be terminated.¹³ Unilaterally enforcing its position, Qwest stopped paying the consulting fee. The last payment was for August of 2001.¹⁴ There is a correlation between the timing of Eschelon's assertion of its various rights and Qwest's stopping of the payments. Qwest knew full well the impact of its action, particularly in the prevailing telecommunications market. Because bankruptcies were so common at that time, one could hardly open a telecommunications publication during this period without reading about another one. Qwest earns more revenue by the second day of January in each year than Eschelon earns in an entire year. Qwest knew which party's bargaining position would be most adversely affected by its decision to stop payments.

When Eschelon raised this issue previously, Eschelon said that it "does not know whether any CLEC that did stop its participation in CMP, if any, continued receiving payments whereas the payments to Eschelon stopped." See Eschelon's June 24 Letter, p. 5, note 14. As indicated, Eschelon does not have access to all of the information necessary to make this determination. Eschelon is aware that other unfiled agreements between other carriers and Qwest have been disclosed, including an agreement or agreements that require payments to McLeodUSA. McLeodUSA was initially a CMP Core Team Member, but its status was changed for failure to participate actively in the working sessions. See Exhibit 18, pp. 11-12. Eschelon has had no opportunity to review the various McLeodUSA agreements, nor is it requesting that here. Eschelon can only state that it cannot confirm one way or another whether McLeodUSA (or any other

¹³ Qwest attempted to impose other conditions as well, as discussed below with respect to the proposals signed by Ms. McKenney. See Exhibit 21.

¹⁴ The Switched Access Reporting Agreement required Qwest to pay Eschelon the difference between \$13.00 per line and \$16.00 per line from January 1, 2001 until the parties agreed to do otherwise. See Letter from Audrey McKenney to Eschelon's President, p. 2 (July 3, 2001) ["Switched Access Reporting Letter"] (provided by Eschelon in response to Staff Request Number 1:2 in Docket Number RT-00000F-02-0271). Although the parties did not agree to do otherwise until March 1, 2002, Qwest also stopped paying Eschelon pursuant to the Switched Access Reporting Letter as of September 2001. Eschelon (not Qwest) had complained about other switched access reporting issues. Unlike the consulting fee, at least some other access issues were the subject of a dispute. When payments stopped, however, there was no dispute that the \$3 per line (approximately \$150,000 per month) was due to Eschelon pursuant to the terms of the Switched Access Reporting Letter. Qwest was not claiming, for example, that Eschelon had yet agreed otherwise.

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carrier) payments, if any, continued while its participation in the CMP Core Team decreased and, if so, whether the two issues are related.

In response to Eschelon's initial statement along these lines, Qwest objects to the possible implication that "Qwest made payments to other CLECs to keep them from participating in the CMP process." See Qwest's June 27 Letter, p. 4. Qwest implies that Eschelon has no evidence that would suggest that Qwest would do such a thing. Enclosed with this Letter is a document, provided to Eschelon by Qwest and signed by Ms. McKenney, that provides that Qwest was willing on October 30, 2001 to pay Eschelon money as long as Eschelon refrained, among other things, "from participating in . . . Change Management Process workshops." See Exhibit 21 (Qwest Proposed Confidential Purchase Agreement ¶ 3). Although Eschelon did not sign this proposal, Qwest was clearly making the offer. Eschelon does not know whether any other carrier was offered and accepted this or a substantially similar proposal. The fact that Qwest made the offer to Eschelon, however, raises the legitimate question as to whether this occurred at the same or any other time.

Eschelon does not have copies of all of the approximately 100 unfilled agreements that Qwest has entered into with various carriers and, of course, it cannot have copies of unwritten agreements. In this environment, it is fair to state that Eschelon does not know whether any carrier signed a document similar to Exhibit 21 and, if so, whether Qwest continued to make payments pursuant to that agreement. Eschelon is not claiming a right to this information. It is an issue for the Commission to investigate, if it so desires.

Qwest concludes its discussion of this issue by stating that "Qwest's and Eschelon's billing disputes are wholly unrelated to the 271 process." Eschelon agrees and, quite frankly, wishes Qwest would have taken this position much earlier. If it had, Eschelon could have participated in the 271 proceedings while negotiating disputes with Qwest. Qwest's assertion now begs the question as to why Qwest then conditioned negotiation of disputes on agreements not to participate in 271 proceedings.

CMP Participation, Absence of Complaints, and Advocacy Regarding Participation in Proceedings

Except when completely excluded from meetings, Eschelon maintained some level of participation in CMP.¹⁵ Although Qwest was not always as successful in limiting Eschelon's participation in CMP as it desired,¹⁶ Qwest's efforts nonetheless forced Eschelon to expend resources in responding to and resisting Qwest's position. See, e.g., Exhibits 8 & 13. Those resources could have been expended on other CLEC business.

¹⁵ Although Eschelon managed to maintain some level of participation in CMP and CMP Re-design, Qwest succeeded particularly in chilling the number of live examples of problems with commercial performance that Eschelon brought to the meetings.

¹⁶ As to whether Qwest attempted to influence Eschelon's level of participation, please see the previous section and attached exhibits.

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Also, Eschelon had to consider the risks associated with upsetting its monopoly supplier while at the same time try to protect its own interests. This meant that Eschelon had to maintain a conciliatory tone and cooperate in Qwest's requests at times, even when full, uninhibited participation would have been preferable.¹⁷

Qwest also claims that, at any time, "Eschelon could have sought redress through *regulatory* or legal avenues." See Qwest's June 27 Letter, p. 2 (emphasis added). Qwest does not acknowledge the following restriction in the Escalation Letter:

During the development of the Plan, and thereafter, if an agreed upon Plan is in place by April 30, 2001,¹⁸ Eschelon agrees not to . . . *file complaints before any regulatory body* concerning issues arising out of the Parties' Interconnection Agreements.

See Exhibit 14 (Escalation Letter) (emphasis added), p. 1. Despite Qwest's sweeping claims to the contrary, Eschelon could not, consistent with its obligations, file complaints before any regulatory body regarding quality of service, pricing, discrimination, or any other issue arising under the interconnection agreement during negotiations or afterward. Qwest has not explained why it insisted on the terms of the Escalation Letter as part of proceeding to develop and implement a plan to address Eschelon's quality of service complaints. It has not said why Eschelon could not both work with Qwest to develop a plan and, until satisfied, participate in the 271 and SGAT workshops.¹⁹ When a plan was successfully implemented, Eschelon could have then filed a withdrawal from the 271 proceedings and proclaimed its issues were resolved (as SunWest apparently did, see discussion below). If a plan was not successfully implemented, Eschelon could have filed complaints. Although Qwest's letters suggest that Eschelon was free to do so, the provisions of the Escalation Letter were a Qwest condition of obtaining and implementing a plan to improve service quality, not a provision following successful implementation of a plan. See Exhibit 14; Eschelon's June 24 Letter (pp. 2-4).

Although Qwest conditioned obtaining and implementing a plan to improve service quality upon not opposing Qwest in 271 proceedings, Qwest claims that the purpose of the Escalation Letter "was not to suppress complaints but to *resolve* them." Qwest's June 18 Letter, p. 1 (emphasis in original). As discussed, the text of the Escalation Letter expressly suppresses complaints before, during, and after

¹⁷ Also, as indicated above, the limitations on Eschelon's participation did result in some decisions that lasted beyond the meetings in which Eschelon's participation was affected or precluded.

¹⁸ As indicated in Eschelon's June 24 Letter, this date was extended until the end of July 2001.

¹⁹ Qwest refers to agreements "wherein a CLEC agreed not to participate in the 271 proceeding" and states that "there were only *two* such agreements." Qwest's Comments, p. 3 (emphasis added). Qwest then goes on to discuss *three* such agreements: Eschelon, XO, and McLeodUSA (unwritten agreement "not to be involved in 271"). See *id.* pp. 4-5 & 8. Qwest has not explained why any of these agreements were necessary, if the information possessed by these three CLECs and their participation would not have affected the outcome of the 271 proceedings anyway, as claimed by Qwest.

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implementation of a quality service plan. Additionally, as Eschelon previously pointed out:

[O]n October 30, 2001, Qwest provided two written proposals to Eschelon. In those proposals, Qwest said it would require Eschelon to "deliver to Qwest all reports, work papers, or other documents related to the audit process" relating to missing switched access minutes to Qwest. Qwest also conditioned payments otherwise legitimately due to Eschelon upon Eschelon agreeing that it would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)." Eschelon refused to sign these proposals. The issues between Eschelon and Qwest could easily have been resolved without these provisions, which did nothing to address problems experienced by Eschelon. But, Qwest included those terms as an integral part of its proposals.

See Eschelon's June 24 Letter, p. 5; see also Exhibit 21 (Proposed Confidential Billing Settlement Agreement, ¶ 7 & Proposed Confidential Purchase Agreement, ¶ 3).

Ms. McKenney signed these proposals, copies of which are attached. *See id.*²⁰ Qwest has not explained the purpose of delivering all evidence of the audit process to Qwest, if not to "suppress" information. *See Qwest's June 18 Letter, p. 1.*²¹ With respect to the proposal that said Eschelon would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)," *see id.*,²² it provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate.²³ The agreement simply contained an offer of a monetary inducement to obtain services and testimony upon request.²⁴ The same document required that the agreement remain confidential.

²⁰ Qwest has actually suggested that Ms. McKenney may represent Qwest on the committee it has said that it will form to review agreements with respect to the filing requirement. *See Exhibit 22 (Excerpt from Minnesota transcript, p. 47, line 23 – p. 48, line 2 & p. 50, line 22 – p. 51, line 7).*

²¹ Although Qwest may argue that this provision relates to protecting customer-identifying information, that is not the case. Most of the audit documents contain no customer-identifying information. In any case, both Qwest and Eschelon routinely deal with customer-identifying and other confidential information without making one carrier turn everything over to the other. As indicated in Eschelon's letter to Mr. Nacchio (discussed in Qwest's Comments, p. 8), Qwest's verbal communications to Eschelon suggested Qwest's intent even more clearly than the written documentation.

²² Qwest's Proposed Confidential Purchase Agreement (¶ 3) also provided: "Eschelon agrees, during the term of this PA, to refrain from initiating or participating in any proceeding (regulatory, judicial, arbitration, or legislative) where Qwest's interests may be implicated, including but not limited to, formal or informal proceedings related to Qwest's or its affiliates' efforts to obtain relief pursuant to section 271 . . . , including but not limited to, Change Management Process workshops, performance indicator/assurance dockets and cost dockets." *See Exhibit 21.*

²³ The fact that Eschelon need not be reminded of its obligation to testify truthfully (as alleged by Mr. Martin) is evident from the fact that Eschelon (and not Qwest) raised this issue. Without language in the document to this effect, however, the proposed contractual obligation reads as Qwest intended it – as requiring Eschelon to testify when and how dictated by Qwest.

²⁴ Qwest's proposal provided that payments would be made monthly so long as Qwest unilaterally determined that Eschelon was providing services "satisfactory" to Qwest. *See Exhibit 21 at ¶ 2.* Those

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See Eschelon's June 24 Letter, p. 5; *see also* Exhibit 21 (Proposed Confidential Billing Settlement Agreement, ¶ 7 & Proposed Confidential Purchase Agreement, ¶ 3). Ms. McKenney signed these proposals, copies of which are attached. *See id.*²⁰ Qwest has not explained the purpose of delivering all evidence of the audit process to Qwest, if not to "suppress" information. *See* Qwest's June 18 Letter, p. 1.²¹ With respect to the proposal that said Eschelon would "when requested by Qwest file supporting testimony/pleadings/comments and testify whenever requested by Qwest in a manner suitable to Qwest (substantively)," *see id.*,²² it provided no limitation on Qwest's requests, such as that the testimony requested be true and accurate.²³ The agreement simply contained an offer of a monetary inducement to obtain services and testimony upon request.²⁴ The same document required that the agreement remain confidential.

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See id. Therefore, if Eschelon agreed to the proposal, it would be placed in the position of having to offer testimony without disclosing a fact that would bear on the veracity of that testimony – it had been induced. Eschelon rejected Qwest's proposals, although it did not do so lightly. Eschelon viewed this as its Cuban Missile Crisis with Qwest and genuinely did not know how Qwest would react.

Although Qwest claims that it was just negotiating routine settlement agreements, Qwest has not explained why provisions relating to delivery of evidence to Qwest or testifying as dictated by Qwest are legitimately related to resolving genuine service and pricing disputes. In negotiations, Qwest would not discuss resolution of legitimate issues such as missing switched access minutes, however, without also discussing a commitment by Eschelon relating to evidence and testimony. In its response, Qwest does not address the language of the documents in Exhibit 21. *See* Qwest's Comments, p. 10. Similarly, when Eschelon raised this question in a letter to Qwest's then Chief Executive Officer Joseph Nacchio (which was copied to Qwest's current General Counsel),²⁵ Qwest did not respond to the specific facts. As Qwest indicates in its Comments, Qwest said that it would not "dignify each of Mr. Smith's allegations with a response." Qwest's Comments, p. 9.²⁶ After reading the documents in Exhibit 21 and considering the absence of an explanation, however, a more reasonable conclusion is that Qwest was silent with respect to the proposals in Exhibit 21 because the documents speak for themselves.²⁷

Instead of addressing that issue or acknowledging the express language of the Escalation Letter suppressing complaints, Qwest argues that Eschelon "evidenced a continuing awareness of its ability to go to the regulators if its concerns were not addressed." Qwest's June 27 Letter, p. 2; Qwest's Comments, p. 7. The fact that Eschelon's participation was virtually non-existent in 271 proceedings, combined with

"services" included, for example, Change Management functions. *See id.* If Qwest was not "satisfied" in any particular month, Qwest could, in its discretion, penalize Eschelon for behavior it deemed bad by refusing payment. *See id.*

²⁵ Qwest states in its Comments (p. 8) that AT&T submitted a copy of Eschelon's February 8, 2002, letter to Mr. Nacchio with its filing in both Arizona Docket Numbers RT-00000F-02-0271 and T-00000A-97-0238. Therefore, Eschelon has not attached another copy with this filing. Although the Escalation Letter required Mr. Nacchio to meet with Eschelon, he refused to do so. Although Mr. Nacchio indicated that Ashfin Mohebbi would act on his behalf (*see* letter attached to Qwest's Comments), the Escalation Letter specifically identified Mr. Nacchio and not a subordinate. *See* Exhibit 14. Moreover, despite Mr. Nacchio's representation, Mr. Mohebbi never participated in escalation (or any) discussions.

²⁶ Qwest states that it attached a copy of Mr. Martin's letter to its Comments, so Eschelon has not attached another copy with this filing.

²⁷ The other point that Qwest states it will not "dignify" with a response is a point that was not even made by Eschelon. *See* Qwest June 27 Letter, p. 1, note 1. Although Qwest focuses on some introductory language from a *Wall Street Journal* article cited by Eschelon, Eschelon's June 24 Letter (p. 1) clearly cites the article as evidence to support Eschelon's statement that "Qwest continually attempted to distinguish Qwest from the former company, US West." The examples in the *Wall Street Journal* show this is the case. Qwest's silence on this latter point may reasonably be viewed as an admission that it cannot dispute the truth of the statement about Qwest's conduct vis a vis the former US West.

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the absence of Eschelon complaints against Qwest (on non-cost issues),²⁸ shows that Eschelon was not in a position to put that advocacy to the test by risking a breach of the Escalation Letter. Eschelon did argue privately to Qwest that Eschelon believed it had the right to participate more fully in proceedings. Because Qwest routinely did not respond in writing to Eschelon's letters, Qwest has left itself the option of pointing to Eschelon's letters as though Qwest agreed with them at the time. Qwest fails to mention, however, that Qwest verbally opposed Eschelon's advocacy in this regard in no uncertain terms.

One example, in particular, stands out. Eschelon argued to Qwest that the Escalation Letter's requirement that Eschelon "not oppose" Qwest in 271 did not preclude participation in proceedings relating to the language of Qwest's Statement of Generally Available Terms ("SGAT").²⁹ For example, in a letter dated April 5, 2001, Eschelon argued to Qwest: "In theory, Eschelon can either shape interconnection agreements through participation in SGAT proceedings or we can attempt to negotiate agreements with Qwest as desired by Qwest. . . . Either the Implementation Plan must deal substantively with the interconnection agreement process or Eschelon must participate in SGAT proceedings." Exhibit 23, p. 4. Although Qwest is not specific, Eschelon's assertion in this letter apparently "evidenced a continuing awareness" of Eschelon's ability to participate in SGAT proceedings. On this particular occasion, Eschelon not only made its argument but also attempted to act upon it. Eschelon sent a representative, Ms. Clauson, to the multi-state SGAT workshop held in Denver April 30 - May 2, 2001.

Qwest's opposition was swift and unambiguous. Shortly after Ms. Clauson entered the room where the workshop was held, Nancy Lubamersky of Qwest picked up her cell phone and left the room. Before the first break, Qwest had called Eschelon's President to complain of Ms. Clauson's presence. In addition, at the outset of the first break, Qwest's attorney Charles Steese summoned Ms. Clauson to the hallway for a conversation. Mr. Steese told Ms. Clauson in no uncertain terms that she should not be present. He said that he had it on good authority that the agreement to keep Eschelon out of the 271 proceedings specifically included Ms. Clauson. Ms. Clauson attempted to explain the actual language of the Escalation Letter, but Mr. Steese was not interested. Through Qwest's calls to Eschelon and conversation with Ms. Clauson, Qwest succeeded in chilling Eschelon's full participation. After the workshop, Qwest called Eschelon to the carpet and made Eschelon explain "what Karen Clauson had said and had not said" during the workshops. *See* Exhibit 24. In a follow up conference call "to discuss Karen's participation in that meeting and in similar future meetings," *see id.*, Qwest reiterated its position that Eschelon could not participate in the SGAT workshops. Eschelon did not participate in 271/SGAT workshops after this additional demonstration of Qwest's opposition.

²⁸ The Escalation Letter provided that Eschelon could, after notice to Qwest, participate in regulatory cost dockets or dockets regarding the establishment of rates. *See* Exhibit 14.

²⁹ *See* Eschelon's June 24 Letter, p. 3 & note 8.

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271 Participation: March of 2002 and After

Qwest states: "Importantly, the Agreement, including any agreement not to oppose Qwest's application for relief under Section 271, was terminated in February of 2002. To the extent that Eschelon decided not to participate fully in the 271 process after that termination, it was Eschelon's internal business decision that mandated that result, not the Agreement." Qwest's June 27 Letter, p. 2; *see also* Qwest's Comments, p. 7. The agreement to not oppose Qwest's 271 bid did not terminate until an effective date of February 28, 2002. *See* Exhibit 25. That agreement was executed on the afternoon of Friday, March 1, 2002. *See id.* Therefore, the first business day on which Eschelon could actually participate in Qwest 271 proceedings was March 4, 2002. On March 4, 2002, Eschelon provided discovery responses to the Minnesota commission, including a 3-inch, 3-ring binder of materials, in Minnesota's 271 proceeding. Minnesota had completed fewer 271 workshops or hearings at that point than other states, and it was one of the few states in which discovery had been directed to Eschelon. Shortly afterward, Eschelon provided similar materials to the Washington commission in response to discovery requests in its 271 proceeding. Recently, Eschelon filed comments with the Federal Communications Commission ("FCC") in opposition to Qwest's 271 application. *See* Exhibit 26 (also available, with exhibits, at <http://www.fcc.gov/e-file/ecfs.html>).

Significantly, Qwest discusses Eschelon's alleged lack of participation in 271 proceedings after termination of the agreement without mentioning that the 271 workshops were essentially completed by then and, when Eschelon has attempted to participate, Qwest has opposed those efforts. In Arizona, Eschelon understood that all workshops were completed by March 2002. Arizona held special open meetings addressing Qwest Operations Support Systems ("OSS") and Performance Assurance Plan ("PAP") after that date, but those meetings would have been particularly difficult to participate meaningfully in without the benefit of participation in the preceding proceedings on those complex topics. To the extent that any 271 proceedings in other states remained active, they were so far along that getting up-to-speed on substance and procedure in time to participate meaningfully was not a realistic possibility. Moreover, when Eschelon attempted to participate in the Minnesota 271 proceeding and to support AT&T's efforts to re-open other proceedings, Qwest opposed those efforts. In Minnesota, Qwest filed a motion to strike Eschelon's testimony. Absence from the 271 proceedings for a period of more than a year has affected Eschelon's ability to participate effectively in 271 proceedings at this point. Although Eschelon has attempted to participate in 271 proceedings on and after March 4, 2002, the reality is that Qwest succeeded in its objective that Eschelon not participate meaningfully for the time period when participation mattered.

Ironically, after criticizing Eschelon for not participating in 271 proceedings after February of 2002 (*see* Qwest's June 27 Letter, p. 2; Qwest's Comments, p. 7), Qwest will likely complain now that Eschelon has filed comments with the FCC in opposition to

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Qwest's 271 bid. Qwest has questioned the motives of other CLECs that have challenged its 271 bid on the grounds that they are merely trying to keep Qwest out of their market rather than raising genuine concerns. Qwest may do so now as to Eschelon as well. Eschelon is not an interexchange carrier ("IXC") itself; Eschelon resells the long distance service of another carrier. Eschelon recognizes, however, that allowing Qwest to enter the in-region, interLATA market prematurely would be detrimental to Eschelon, as well as other CLECs and IXCs in Qwest's territory. When weighing this as a motive for Eschelon's actions, however, the Commission should consider that Eschelon nonetheless at one time entered into the Escalation Letter and said it would possibly even support Qwest's 271 bid in 271 proceedings if Qwest's performance justified doing so. That didn't work. Eschelon is opposing Qwest's 271 bid now because genuine commercial performance issues show that Qwest's entry into the in-region long distance market at this time would be premature. *See Exhibit 26.*

Any Benefit Unrelated to Limitation on 271 Participation

Qwest argues that persuading CLECs to stay out of the 271 proceedings aided the process and benefited all CLECs. *See Qwest's Comments*, pp. 7 & 10. For example, Qwest argues that developing an implementation plan to improve the provisioning process for Eschelon benefited all CLECs because the improved process was implemented uniformly. *See id.* While Eschelon agrees that efforts to improve Qwest's provisioning process benefited CLECs, as well as Qwest, Eschelon does not agree that this could not have been done without an agreement to stay out of 271 proceedings. Qwest could have simply worked with CLECs to understand their needs and the CLEC perspective and then improved its processes accordingly. Unfortunately, Qwest was not willing to proceed on that basis.³⁰

³⁰Qwest entered into a confidential agreement with Eschelon, which has since been terminated as to Eschelon, providing for a 10% consulting fee. *See Consulting Fee Agreement*, at ¶ 3. Qwest could have filed this agreement with the commissions and made it available to other CLECs, but it chose not to do so. The fee was part of an arrangement under which Qwest was supposed to purchase consulting services from Eschelon that would benefit all CLECs. As indicated, Qwest recently testified that it now places a "very high value" on the consulting services of Eschelon. *See Rixe Testimony*, p. 9, line 15. Eschelon firmly believes that its efforts were valuable and, in arguing this point, provided documentation and information to Qwest to support Eschelon's position. While Eschelon believes that Qwest benefited from Eschelon's actions because Eschelon expended substantial resources trying to get Qwest to improve its performance, Qwest did not recognize this at the time or actually accept the consulting services. Qwest resisted Eschelon's efforts to form teams or otherwise work on a true consulting basis to improve Qwest's processes. The amount of resources that Eschelon expended to attempt to effectuate change were far more excessive than they needed to be if Qwest had accepted Eschelon's services willingly, given Eschelon (and other CLECs) visibility into its processes, and worked together at an early stage to ensure that processes, when developed, met CLEC needs. For Qwest to now describe in favorable terms its adversarial position that caused such additional resource expenditures does not capture the true course of events, even though Eschelon does agree that its efforts benefited Qwest and other CLECs as well. More recently, it has come to light that Qwest was entering into other unfiled agreements at the time, such as reported agreement(s) ostensibly to purchase fiber capacity, for a discount. If so, this additional information provides further evidence that Qwest's costs are not cost-based, because they allow for Qwest to offer these "discounts" in various forms, and the resale discount, in particular, may need to be reviewed.

What Could Have Been

Qwest attempts to place an unattainable burden on CLECs: to show what would have transpired if the 271-related agreements had not existed. *See, e.g.*, Qwest's June 27 Letter, p. 1. Because of such an agreement, however, Eschelon was not involved in the 271 process and does not know whether all of its issues have been addressed. Eschelon can indicate that Qwest commercial performance problems still exist. *See* Exhibit 26. Eschelon can also point out that its business plan is different from other CLECs that were involved in the process. Eschelon recognizes and appreciates the diligent, resource-intensive, and valuable efforts of larger CLECs, but their needs and those of Eschelon are not the same. In fact, none of the "committed advocates" listed by Qwest as participants in the proceeding have the same needs or information as Eschelon. *See* Qwest's Comments, p. 11. Nor do they have the commercial experience in Qwest's territory comparable to that of Eschelon and McLeodUSA, reportedly Qwest's two largest wholesale customers, neither of which participated. Undoubtedly those participants are committed, but different business plans and commercial experience are significant factors when shaping terms of an SGAT or analyzing commercial performance.

The existence or non-existence of the 271-related agreements is not the only factor affecting what could have been. In June of 2001, Qwest received discovery requests that, by its own account, sought production of the agreements not to participate in 271, but Qwest did not produce them. This fact presents the question of what would have transpired if Qwest complied with the discovery request last June.

On June 11, 2001, AT&T served the following discovery request on Qwest:

Please produce all agreements, letters and other documents of any kind that reflect the terms and provisions, or any term or provision, of settlement made between Eschelon and Qwest.

Exhibit 27 (AT&T's Thirteenth Set of Data Requests to Qwest, Request No. 126, 271 multi-state proceeding, June 11, 2001).³¹

AT&T also requested copies of such agreements with McLeodUSA and a company called Sun West Communications, Inc. ("SunWest"). *Id.*³² SunWest had raised issues relating to Qwest's provisioning of unbundled loops deployed over IDLC with number portability in the Colorado 271 workshop. On June 1, 2001, Qwest filed a

³¹ Also available at www.libertyconsultinggroup.com/discovery_requests.htm.

³² In addition, with respect to any carrier, AT&T requested any "settlement made by Qwest of any dispute over Qwest's compliance, or lack of compliance, with one or more items of the competitive checklist set forth in 47 USC § 271(c)(2)(B)." *Id.*

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"Withdrawal of Opposition to Qwest's Petition to Obtain Approval to Enter the In-Region InterLATA Telecommunication Market" in the Colorado 271 docket on behalf of SunWest [Withdrawal]. See Exhibit 28. In the Withdrawal, SunWest said that it had reached a settlement with Qwest. SunWest also said that the issues it raised in the Section 271 workshops had been resolved to SunWest's satisfaction. See *id.* The timing of AT&T's discovery request (dated ten days after the Withdrawal) suggests that the mention of a "settlement" in the Withdrawal prompted AT&T's request. By June 11, 2001, Eschelon was absent from 271 workshops, even though Eschelon had previously raised significant issues in those proceedings. Unlike SunWest, Eschelon's quality of service issues had not been resolved to Eschelon's satisfaction.

With respect to SunWest, Eschelon, and McLeodUSA, AT&T requested "settlement" agreements. Qwest specifically states that the two agreements referred to by Commissioner Spitzer that mention Section 271 proceedings, which include the Eschelon Escalation Letter, are "settlements." See Qwest June 18 Letter, p. 1. Therefore, by Qwest's own account, the agreements are responsive to AT&T's request. Qwest responded, however, by objecting to the request without providing copies of any agreements.³³ Qwest said:

In addition to the General Objection, Qwest objects to this request on the grounds that it is overly broad, global, seeks information protected by the attorney-client privilege, attorney work product doctrine, or any other legally cognizable privilege, seeks third-party confidential information, seeks information that is highly confidential, proprietary, and competitively sensitive, and seeks information that is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

See Exhibit 29 (Qwest's Objections and Responses to AT&T's Thirteenth Set of Data Requests, Response to Request No. 126, 271 multi-state proceeding, June 20, 2001).³⁴

Although Qwest objected that the Request called for "third-party confidential information," Qwest did not ask Eschelon for consent to disclose any agreements before responding to AT&T's request, despite language in some of the agreements indicating that they could be disclosed with express written consent of the other party. Nothing in the Escalation Letter prevented Qwest from seeking consent to provide copies in discovery. In addition, with respect to the Consulting Fee Agreement (§ 10), it provides:

In the event either Party . . . has a legal obligation which requires disclosure of the terms and conditions of this Confidential Agreement, the Party having the obligation shall immediately notify the other Party in writing of the nature, scope and source of such obligation so as to enable the other Party, at its option, to take

³³ On every occasion on which Eschelon has been asked to produce its unfiled agreements with Qwest in discovery, Eschelon has provided copies of them (including the Escalation Letter).

³⁴ Also available at www.libertyconsultinggroup.com/discovery_requests.htm.

such action as may be legally permissible so as to protect the confidentiality provided in this Agreement.

Although Eschelon received a copy of the above discovery request directed to Qwest, Eschelon did not exercise its option to take any action to protect the confidentiality provided in the Agreement. Yet, Qwest did not produce the Consulting Fee Agreement or any of the other agreements, including the Escalation Letter, to AT&T in its Response. As indicated, AT&T served its discovery request upon Qwest on *June 11, 2001*. If Qwest had provided AT&T with copies of the Eschelon, McLeodUSA and other agreements at that time, AT&T (and any other party receiving copies of discovery responses) could have raised the issues being addressed by the Commission now at least *seven months* earlier.³⁵ The Commission will decide whether, in addition to identifying any "specific terms or issues" that were not addressed in the 271 workshop process,³⁶ these facts are relevant.

Conclusion

In Eschelon's June 24 Letter, Eschelon indicated that it hesitated to send its letter for a number of reasons, including the state of the telecommunications market, tight resources particularly for a start-up, smaller company, and the fact that Eschelon has settled some of its own claims with Qwest and may be viewed as late in speaking out. Twenty-some additional pages and many exhibits later, Eschelon can confirm that going down this path has caused resource expenditures. Given the statements in Qwest's June 27 Letter and Qwest's Comments and the Commission's expression of its desire for more information to assess those statements, however, it seems incumbent upon Eschelon to provide this information. At the same time, Eschelon is aware that some may criticize Eschelon for entering into unfiled agreements with Qwest. Eschelon had pressing service and pricing issues that it needed resolved to stay alive.³⁷

With respect to Qwest's application for 271 approval, Eschelon has stated its position in its FCC filing. See Exhibit 26. Although Eschelon was not an active participant in the Arizona 271 proceeding so it cannot state how each of these issues was addressed, Eschelon can state that the unresolved commercial performance problems described in those Comments occur in Arizona as well. With respect to issue of the impact of the unfiled 271-related agreements on the proceeding, Eschelon has laid out facts responsive to points raised by Qwest that the Commission may use in making its

³⁵ A&T has indicated that it did not learn of the agreements until after the Minnesota Department of Commerce filed its complaint relating to unfiled agreements in February of 2002. Although AT&T's discovery request was served in the multi-state 271 proceeding, information from one proceeding often also becomes available in other proceedings. Once AT&T received the information in the multi-state proceeding, AT&T could have also requested it in Arizona, for example.

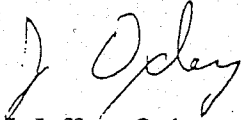
³⁶ Eschelon believes that it has identified such terms and issues, because it has identified commercial performance problems that remain unresolved. See Exhibit 26.

³⁷ When considering relative positions of the parties, Eschelon is a \$100 million CLEC with 900 employees, and Qwest is a \$19 billion RBOC with 60,000 employees.

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determination. Commissioner Spitzer's Letter of June 26 suggested that Eschelon and Qwest address the inconsistencies between their earlier letters, and Eschelon has tried to be responsive to that request.

Sincerely,



J. Jeffery Oxley

Vice President, General Counsel, and Corporate Secretary

cc: Chairman William A. Mundell (by facsimile & overnight mail)
Todd L. Lundy, Qwest (by U.S. mail)
Richard Corbetta, Qwest (by email)
Paul A. Bullis, AG Public Advocacy Division (by U.S. mail)
Lindy P. Funkhouser, Residential Utility Consumer Office (by email & U.S. mail)
Docket Control (original plus 20 copies) (by overnight mail)
Service Lists (all parties of record in both dockets) (by email & U.S. mail)

EXHIBIT H

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF MINNESOTA

Gregory Scott
Edward A. Garvey
Marshall Johnson
LeRoy Koppendrayer
Phyllis Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation Into
Qwest's Compliance with Section 271 of the
Telecommunications Act of 1996 that the
Requested Authorization is Consistent with the
Public Interest, Convenience and Necessity

PUC Docket No. P421/CI-01-1373
OAH Docket No. 6-2500-14488-2

AFFIDAVIT OF F. LYNNE POWERS

I, F. Lynne Powers, being duly sworn, state:

1. I am the Executive Vice President of Customer Operations for Eschelon Telecom, Inc. ("Eschelon"). My areas of responsibility include provisioning, repair, and customer care.

UNE-Platform

2. In approximately mid-May of 2000, Eschelon began efforts to prepare to order from Qwest UNE-Platform ("UNE-P") lines. UNE-P is a combination of the following unbundled network elements ("UNEs"): loop, switching, and transport. At that time, Qwest did not provide information about feature availability with UNE-P on its web-site. Feature information is critical to developing and marketing a product. It took more than four months for Eschelon to extract that information from Qwest. When Eschelon finally obtained a list of available features, the list was incomplete and unclear.

3. In the absence of receiving a definitive list of available features for UNE-P from Qwest and in the process of compiling its own list of Universal Service Ordering Codes ("USOCs") for ordering, Eschelon attempted to test availability of various features and USOCs by placing trial orders (using employee lines) in Minnesota. Eschelon wanted to submit trial orders in additional states as well. But, at that time, Qwest would not accept orders for UNE combinations anywhere in its territory, except Minnesota, without a contract amendment. Qwest took this position even though Eschelon has an interconnection agreement with Qwest in every one of the states in which it operates¹ that

¹Eschelon does business within Qwest territory in Arizona, Colorado, Minnesota, Oregon, Utah, and Washington. Other than the information relating to the Minnesota UNE-P trial orders (and certain repair information discussed below), the information in this Affidavit (including that relating to UNE-E/UNE-Star) applies in each of these states.

EXHIBIT H

requires Qwest to provide UNEs "in combination" in accordance with the Act, FCC rules, and state law.² In those states, Eschelon has opted in to interconnection agreements of AT&T Communications, Inc. ("AT&T"). Therefore, Eschelon, AT&T, and other opt-in Competitive Local Exchange Carriers ("CLECs") should have been able to order UNE combinations pursuant to the terms of their existing interconnection agreements with Qwest. But, for many months, the only state in Qwest's territory where Qwest would process orders for UNE combinations without a contract amendment was Minnesota. Although Qwest had previously required a contract amendment in Minnesota as well, Qwest changed its position after the Minnesota Public Utilities Commission issued a decision requiring Qwest to provide UNE Combinations.³

4. In Minnesota, where Qwest allowed Eschelon to submit UNE-P orders, the UNE-P trial orders resulted in denial and loss of features, including Qwest deletion of features without notice to Eschelon; unclear and changing processes; and customer-affecting service problems. Minnesota UNE-P trial order customers experienced:

- complete outages, with no dial tone, for a day or more
- inability to call out locally
- inability to place long distance calls
- loss of features
- inability to forward calls between central offices

5. The problems were too numerous to launch a product offering using UNE-P at that time, because doing so would not only have caused Eschelon to incur unnecessary expenses and delays but also exposed Eschelon's end-user customers to these problems. Eschelon also could not afford to leave its Off-Net⁴ customer base on resale, which was prohibitively expensive. UNE combinations not only have lower prices than resale, but also they allow CLECs to collect switched access payments that, with resale, go to the incumbent. Although Eschelon had a contractual right to the lower

² See Eschelon-Qwest Interconnection Agreements: AZ, Part A, ¶ 21 & Att. 3, ¶¶ 3.3 & 18.1; CO Part A, ¶ 8.1 & Att. 3, ¶¶ 2.4 & 15.1; MN, Part A, ¶ 20 & Att. 3, ¶ 14.1; OR, Part A, ¶¶ 19 & 36 & Att. 3, ¶ 14.1; UT, Part A, ¶ 21 & Att. 3, ¶¶ 3.3 & 18.1; WA, Part A, ¶ 21.1 & Att. 3, ¶¶ 1.2.2 & 18.1; *see, e.g.*, Agreement for Local Wireline Network Interconnection and Service Resale Between Advanced Telecommunications, Inc. and U S WEST Communications, Inc., for the State of Arizona, Agreement No. CDS-000106-0212; Decision No. 62489 (Jan. 20, 2000) ("Agreement"). The Arizona Agreement, for example, deals specifically with issues such as the definition of "Combinations," *see id.* Part A, p. 4; cooperative testing of combinations, *see id.* ¶ Att 3, Para 18.1; service order process requirements for combinations, *see id.* Att. 5, ¶ 2.2.2.1, and other issues.

³ See Order After Remand, *In re. the Federal Court Remand of Issues Proceeding from the Interconnection Agreements Between U S WEST Communications, Inc. and AT&T, MCI, MFS, and AT&T Wireless*, Docket No. P-421/CI-99-786 (March 14, 2000) ("MN Order After Remand").

⁴ Eschelon has its own switches for providing voice service. When using its switches to serve its customers, Eschelon orders collocation, loops, *etc.*, from Qwest. In some cases (particularly when a customer is outside of the area served by Eschelon's switch), Eschelon also orders UNE-E, UNE-P, or resale from Qwest to serve customers. Eschelon often refers to customers and lines served through Eschelon's own switching facilities as "On-Net" or "On-Switch" and customers and lines served through UNE-E, UNE-P, or resale as "Off-Net."